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Notes

The Congressional Resurrection of Supplemental Jurisdiction in the Post-*Finley* Era

by

ELLEN S. MOUCHAWAR*

Pendent and ancillary jurisdiction have been branded the "child[ren] of necessity and sire[s] of confusion."¹ These doctrines have generated confusion among the federal courts because the constitutional parameters of the courts' jurisdictional power² have been poorly defined, inconsistently interpreted, and haphazardly applied.³ The separate and dissimilar development of the two doctrines has induced most federal courts to distinguish between them, which in turn has created uncertainty among the circuits. Although the Supreme Court converged the doctrines of pendent and ancillary jurisdiction in the late 1970s by adopting a uniform theoretical framework for all exercises of extra-jurisdictional power,⁴ most lower courts were reluctant to follow.⁵ The Court's attempt at uniformity did not eliminate the confusion.

Although the doctrines remain poorly defined, they are necessary judicial creations for the efficient adjudication of lawsuits in an over-

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1. Note, *Federal Practice: Jurisdiction of Third-Party Claims*, 11 OKLA. L. REV. 326, 329 (1958) (authored by Jay C. Baker) [hereinafter Note, *Federal Practice*].

2. This Note focuses on the *power* of the federal courts to exercise pendent and ancillary jurisdiction. Although it is "recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right," *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), discussion of the federal court's *discretion* to refrain from exercising pendent and ancillary jurisdiction is beyond the scope of this Note.

3. See *infra* notes 59-69, 101-118 and accompanying text.

4. *Aldinger v. Howard*, 427 U.S. 1 (1976) (creating an analytical framework for the pendent-party jurisdictional power determination); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372-73 (1978) (applying the *Aldinger* analysis to the determination of pendent-claim and ancillary jurisdictional power). See *infra* Part I.D.

5. See Note, *Developing a Unified Approach to Pendent and Ancillary Jurisdiction: A Merger Made in Heaven*, 11 VT. L. REV. 505, 512-20 (1986) (authored by Priscilla Dodakian Krikorian) [hereinafter Note, *Developing a Unified Approach*]; *infra* notes 215-217 and accompanying text.

burdened federal court system.⁶ By allowing parties to litigate "non-federal" claims with related "federal" claims,⁷ pendent and ancillary jurisdiction enable federal courts to hear an entire controversy and avoid piecemeal litigation. Consequently, these doctrines foster judicial efficiency, procedural convenience, and party fairness by creating one sensible litigation package.⁸ Moreover, they promote the congressional purposes underlying the grant of original federal jurisdiction: providing plaintiffs a true choice between state and federal forums for adjudication of their entire controversy and ensuring the availability of a federal forum for the vindication of federal rights.⁹

Despite their necessity, pendent and ancillary jurisdiction virtually were extinguished in *Finley v. United States*¹⁰ by the Supreme Court's holding that explicit congressional authorization was necessary for courts to exercise extra-jurisdictional power.¹¹ In so holding, the Court

6. See generally Van Dusen, *Comments on the Volume of Litigation in the Federal Courts*, 8 DEL. J. CORP. LAW 435, 435 (1983) (arguing that "the single most immediate problem confronting the federal judiciary is the overwhelming caseload of the federal courts") (emphasis in original). Professor Van Dusen notes that "[i]n 1882, there were less than 30,000 total cases pending in the United States district and circuit courts. One hundred years later, there were nearly 240,000 Annual civil filings in the federal district courts more than tripled between 1960 and 1981. During the same time, appeals increased sevenfold." *Id.* at 436-37 (quoting Smith, *Role of the Federal Courts*, 88 CASE & COM. 10 (1983)).

7. As used herein, a "nonfederal claim" has no independent basis for federal jurisdiction, and thus is jurisdictionally insufficient. Conversely, a "federal claim" has an independent basis of federal jurisdiction.

8. Courts and commentators have viewed these considerations as the primary purposes underlying the doctrines of pendent and ancillary jurisdiction. See, e.g., *Rosado v. Wyman*, 397 U.S. 397, 405 (1970) (pendent jurisdiction is based on "the commonsense policy" of "the conservation of judicial energy and the avoidance of multiplicity of litigation"); *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (pendent jurisdiction is justified by "judicial economy, convenience and fairness to litigants"); *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 617 n.14 (1966) (ancillary jurisdiction rests on "considerations of judicial economy and fairness"); Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. REV. 247, 249; Miller, *Ancillary and Pendent Jurisdiction*, 26 S. TEX. L.J. 1, 1 (1985); 13 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS* § 3523, at 85-86 (2d ed. 1984) [hereinafter *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION*] ("[a]ncillary jurisdiction exists because without it the federal court neither could dispose of the principal case effectively nor do complete justice in the dispute that is before the tribunal. . . . [It is] a commonsense solution to the problems of piecemeal litigation").

Professor Mengler served as an advisor to the Federal Courts Study Committee in the development of the legislation codifying supplemental jurisdiction at 28 U.S.C. § 1367. See H.R. REP. NO. 734, 101st Cong., 2d Sess. 27 n.13, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 6860, 6873 n.13; Posner, *Introduction* [to *Federal Courts Symposium*], 1990 B.Y.U. L. REV. 1.

9. Mengler, *supra* note 8, at 249; Schenkier, *Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction*, 75 NW. U.L. REV. 245, 247-48, 251-56 (1980); see *infra* notes 205-207, 257-260 and accompanying text.

10. 490 U.S. 545 (1989).

11. *Id.* at 549.

explicitly and implicitly asserted that the doctrines of pendent and ancillary jurisdiction represented "unconstitutional usurpation[s] of power."¹² A close reading of the *Finley* opinion, however, suggests the Court's awareness of not only the undesirable consequences accompanying the extinction of pendent and ancillary jurisdiction¹³ but also the need for a legislative response.¹⁴ The Court's opinion essentially invited Congress to remedy the jurisdictional problems created by its decision.¹⁵ On October 28, 1990, Congress accepted the Supreme Court's invitation by enacting section 1367 of Title 28 of the United States Code.¹⁶

Section 1367 not only resurrects pendent and ancillary jurisdiction, it also makes great strides in resolving much of the confusion surrounding the doctrines. Of primary importance is the adoption of a uniform test for *any* exercise of "supplemental jurisdiction."¹⁷ Federal courts now may exercise supplemental jurisdiction "over all claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."¹⁸ Thus, section 1367 establishes a uniform standard that allows a federal court to determine when it may adjudicate a nonfederal claim as an adjunct to its jurisdiction over the federal claim, regardless of whether the nonfederal claim comes within the doctrine of pendent or ancillary jurisdiction.

12. *Perdue, Finley v. United States: Unstringing Pendent Jurisdiction*, 76 VA. L. REV. 539, 567 (1990).

13. See *infra* notes 256-263 and accompanying text.

14. Mengler, Burbank & Rowe, *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 214 (1991).

15. *Id.*; H.R. REP. NO. 734, 101st Cong., 2d Sess. 28, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 6860, 6874; 136 CONG. REC. S17,580-81 (daily ed. Oct. 27, 1990) (statement of Sen. Grassley) (adopting the House analysis). See *Finley*, 490 U.S. at 550.

16. 28 U.S.C.A. § 1367 (West Supp. 1991). Congress passed section 1367 as part of Title III of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990). Title III is titled the "Federal Courts Study Committee Implementation Act of 1990." See *infra* note 271.

17. The term "supplemental jurisdiction" refers to the doctrines of both pendent and ancillary jurisdiction. Even before the enactment of § 1367, some courts and commentators had embraced this unifying terminology, arguing that no meaningful distinctions exist between pendent and ancillary jurisdiction. See, e.g., *Community Coffee v. K/S Kriti Amethyst*, 715 F. Supp. 772, 774 (E.D. La. 1989); Freer, *A Principled Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34, 34; Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103, 104 (1983) [hereinafter Matasar, *A Pendent and Ancillary Jurisdiction Primer*]; Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1399, 1401 (1983) [hereinafter Matasar, *Rediscovering "One Constitutional Case"*]; Mengler, *supra* note 8, at 247.

18. 28 U.S.C.A. § 1367(a) (West Supp. 1991).

Nonetheless, ambiguities remain. First, although explicitly authorizing supplemental jurisdiction, section 1367 provides little guidance as to the constitutional limits of the courts' power. This Note suggests that the constitutional limitations referred to in section 1367 permit a pragmatic "logical relationship" approach to the litigation unit. In other words, the statute empowers federal courts to exercise supplemental jurisdiction whenever a logical relationship exists between the federal and nonfederal claims, thus providing an efficient and just litigation of claims in a single lawsuit. This approach eliminates the previous distinctions between pendent and ancillary standards. Moreover, it promotes Congress' intent to create an attractive federal forum for the adjudication of federal issues while fostering the goals of judicial efficiency, convenience, and party fairness.¹⁹

Second, section 1367(b) places special limitations on federal supplemental power in cases based solely on diversity of citizenship.²⁰ Even before *Finley*, courts restricted the circumstances in which plaintiffs could raise claims against nondiverse third parties in diversity cases because of concerns that supplemental jurisdiction would encourage plaintiffs to evade the complete diversity requirement.²¹ Section 1367(b) is consistent with this modern trend.

The additional limitations of section 1367(b), however, are subject to varying interpretations. Subsection (b) could be interpreted expansively to prohibit all nonfederal claims raised by a plaintiff against a nondiverse party in a diversity case. Alternatively, a restrictive reading could prohibit supplemental jurisdiction only in cases in which a plaintiff initiates the joinder²² of a nondiverse defendant or a nondiverse

19. See Schenkier, *supra* note 9, at 247-48.

20. 28 U.S.C.A. § 1367(b) provides that in any diversity action:

the district courts shall *not* have supplemental jurisdiction . . . over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 or such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

28 U.S.C.A. § 1367(b) (West Supp. 1991) (emphasis added). See *infra* text accompanying notes 312-313.

21. *E.g.*, *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374-75 (1978). See Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction*, 95 HARV. L. REV. 1935, 1941-43, 1946-53 (1982) [hereinafter Note, *Toward a Theory of Incidental Jurisdiction*]; *infra* notes 201-203 and accompanying text.

In 1806, the Supreme Court held that the general diversity statute, 28 U.S.C. § 1332, requires complete diversity. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806). Thus, diversity does not exist in federal court unless each defendant is a citizen of a state different from each plaintiff. *Id.* Complete diversity is not, however, a constitutional requirement. *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31 (1967).

22. Joinder permits all persons to unite as parties to an action who have related claims

absentee seeks to intervene²³ as a plaintiff. This Note argues that a middle-of-the-road approach would address the concern that plaintiffs might circumvent the diversity requirement, but would not unduly restrict plaintiffs' abilities to raise claims against nondiverse third parties. This approach would limit section 1367(b)'s special restrictions to cases in which a plaintiff in an *offensive position* seeks to raise a claim against a nondiverse party.²⁴

Part I of this Note reviews the doctrines of pendent and ancillary jurisdiction as they existed before *Finley*, focusing upon their confusing and inconsistent application. Part II discusses the *Finley* decision, emphasizing how it threatened the continued viability of pendent and ancillary jurisdiction. Finally, Part III examines the recent congressional resurrection of pendent and ancillary jurisdiction through the passage of section 1367 and proposes the above recommendations for the interpretation and implementation of this new federal statute.

I. The Evolution of Supplemental Jurisdiction

The federal courts are forums of limited jurisdiction.²⁵ The primary limitations on federal subject matter jurisdiction are imposed by the Constitution.²⁶ Article III lists the discrete classes of cases over which federal courts have judicial power.²⁷ Articles I and III further

or against whom rights are claimed, as either co-plaintiffs or co-defendants. FED. R. CIV. P. 19 and 20. See *infra* notes 72, 168-182 and accompanying text. See also FED. R. CIV. P. 14 (impleader); *infra* notes 139-167 and accompanying text.

23. Intervention permits third parties, not originally parties to the suit, to come into the case by claiming an interest in the subject matter, in order to protect their rights or to interpose their claims. FED. R. CIV. P. 24. See *infra* notes 183-195 and accompanying text.

24. Thus, a plaintiff in a *defensive position* could bring a claim against a nondiverse party. For example, if the defendant were to implead a nondiverse third-party defendant under FED. R. CIV. P. 14(a), see *infra* note 124, and that third-party defendant were to bring a claim against the original plaintiff, placing that plaintiff in a defensive position, then the plaintiff could bring a compulsory counterclaim against the nondiverse third-party defendant. However, if the third-party defendant did not bring a claim against the original plaintiff, then that plaintiff, still in an offensive position as to the third-party defendant, could not initiate a claim against the third-party defendant. See *infra* notes 321-327 and accompanying text.

25. This means that a court has no federal subject matter jurisdiction over a claim until the contrary is proven. *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 11 (1799); see 13 FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, *supra* note 8, § 3522, at 60. In contrast, state courts are forums of general jurisdiction, and thus enjoy a presumption of subject matter jurisdiction over a particular controversy unless a contrary showing is made. See 13 FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, *supra* note 8, § 3522, at 60.

26. U.S. CONST. art. III.

27. U.S. CONST. art. III, § 2 provides that:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be

limit federal judicial power by providing that Congress has the power to establish lower federal courts²⁸ and impose limitations and conditions on federal judicial power.²⁹ Thus, in determining whether it has the "power" to hear a particular case, a federal court must refer both to the Constitution and to the statutes that define federal jurisdiction.³⁰

Federal courts developed the doctrines of pendent and ancillary jurisdiction in order to deal with the increasing complexity of litigation. In the absence of a federal statute conferring supplemental jurisdiction,³¹ the federal courts have invoked these doctrines to exert jurisdiction over nonfederal claims that are sufficiently related to one or more federal claims.³² Justification for this extension of federal judicial power has focused on the boundaries of the constitutional "Case."³³

The basic premise behind both pendent and ancillary jurisdiction can be traced to *Osborn v. United States Bank*.³⁴ There, Chief Justice Marshall announced the general proposition that a federal court has jurisdiction over the entire case.³⁵ Federal courts exercising supple-

made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28. U.S. CONST. art. I, § 8, cl. 9 ("The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court"), and art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

29. U.S. CONST. art. III, § 2, cl. 2 ("the supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make").

30. See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 513 (1868); *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1867). The Supreme Court asserted over a century ago that as regards all courts of the United States inferior to [the Supreme Court], two things are necessary to create jurisdiction. . . . The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. . . . To the extent that such action is not taken, the power lies dormant.

Cooper, 73 U.S. at 252. The Supreme Court presently adheres to this principle. See, e.g., *Finley v. United States*, 490 U.S. 545, 548 (1989) (citing *Cooper*).

31. In 28 U.S.C. § 1338, Congress explicitly authorized supplemental jurisdiction over state unfair competition claims in cases arising under federal copyright, patent, and trademark laws. See 28 U.S.C. § 1338(b). Prior to the enactment of § 1367, this was the only statute in which Congress explicitly conferred federal supplemental jurisdiction.

32. See, e.g., *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (pendent jurisdiction); *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926) (ancillary jurisdiction).

33. U.S. CONST. art III, § 2. See, e.g., *Gibbs*, 383 U.S. at 725.

34. 22 U.S. (9 Wheat.) 738 (1824).

35. *Id.* at 821-23. See also *Hagans v. Lavine*, 415 U.S. 528, 554 (1974) (Rehnquist, J.,

mental jurisdiction have sought a rational balance between preserving constitutional jurisdiction limitations and resolving all disputes arising from one set of facts in a single action.³⁶ Focus on the latter goal has resulted in the liberal application of the doctrines with courts emphasizing judicial economy, fairness to litigants, and access to federal forums.³⁷

Despite their common origin and purpose, the doctrines of pendent and ancillary jurisdiction evolved separately.³⁸ Courts generally have distinguished between pendent and ancillary jurisdiction by finding that "pendent" claims are nonfederal claims asserted by the plaintiff in her complaint,³⁹ while "ancillary" claims are nonfederal claims added *after* the plaintiff files the complaint.⁴⁰ This distinction led to divergent standards as to when a federal court could exercise pendent or ancillary jurisdiction.

The Supreme Court brought these doctrines closer together in *Aldinger v. Howard*⁴¹ and *Owen Equipment & Erection Co. v. Kroger*⁴² when it adopted a uniform analysis for the exercise of supplemental

dissenting), in which Justice Rehnquist stated: "No subsequent decision has cast any doubt upon the wisdom of Chief Justice Marshall's expositions in [*Osborn*], since a different result would have forced substantial federal cases into state courts for adjudication simply because they involved nonfederal issues as well as federal ones."

36. *E.g.*, *Lesnik v. Public Indus. Corp.*, 144 F.2d 968, 973-74 (2d Cir. 1944); *Moncrief v. Pennsylvania R.R. Co.*, 73 F. Supp. 815, 816 (E.D. Pa. 1947); *see also* 13 FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, *supra* note 8, § 3523, at 115.

37. *See infra* notes 205-207, 257-260 and accompanying text.

38. *See Matasar, Rediscovering "One Constitutional Case," supra* note 17, at 1411; *Perdue, supra* note 12, at 541-42.

39. The doctrine of pendent jurisdiction is divided into two sub-categories: pendent-claim and pendent-party jurisdiction. Pendent-claim jurisdiction allows a plaintiff to join a factually related state claim to a federal claim in the absence of diversity. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); *infra* Part I.A. Its primary, though not exclusive, application is joinder of claims under FED. R. CIV. P. 18. Pendent-party jurisdiction allows a plaintiff with a federal claim against one defendant to assert a factually related state claim against an additional, nondiverse defendant. *See Aldinger v. Howard*, 427 U.S. 1, 6 (1976); *infra* Part I.B. As defined by the Supreme Court, pendent-party jurisdiction is "jurisdiction over parties not named in any claim that is independently cognizable by the federal court." *Finley v. United States*, 490 U.S. 545, 549 (1989).

40. *See, e.g.*, *Corporacion Venezolano de Fomento v. Vintero Sales Corp.*, 477 F. Supp. 615, 622 n.13 (S.D.N.Y. 1979); *Mengler, supra* note 8, at 247-48; *Perdue, supra* note 12, at 541-42. The distinction made between the two doctrines, however, is not always consistent. *Id. see, e.g.*, *Jacobs v. United States*, 367 F. Supp. 1275, 1277 (D. Ariz. 1973) (characterizing pendent jurisdiction as a subset of ancillary jurisdiction).

41. 427 U.S. 1 (1976). Although technically a pendent jurisdiction case, *Aldinger* has been relied upon in cases delineating the scope of ancillary jurisdiction. *E.g.*, *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372-73, 374, 379-80 (1978).

42. 437 U.S. 365. Although finding it unnecessary to determine whether any principled differences exist between pendent and ancillary jurisdiction, the Court noted that both doctrines addressed the issue of when a federal court may exercise extra-jurisdictional power. *Id.* at 370.

jurisdiction.⁴³ In *Kroger*, the Court recognized that pendent and ancillary jurisdiction are essentially "two species of the same generic problem: Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same State?"⁴⁴ *Aldinger* and *Kroger*, however, left many questions unanswered. Moreover, most lower federal courts were reluctant to follow the Supreme Court's lead in uniformity.⁴⁵ Thus, the Court's creation of a uniform theoretical framework was ineffective at eliminating the inconsistent application of these two doctrines.

A. Pendent Jurisdiction

As discussed previously, the judicial development of pendent jurisdiction can be traced to *Osborn v. United States Bank*,⁴⁶ in which the Supreme Court announced that a federal court has jurisdiction over the entire case before it.⁴⁷ Over the next century and a half the Court worked to define and limit the boundaries of the doctrine.⁴⁸ In *United Mine Workers v. Gibbs*,⁴⁹ the Supreme Court unanimously refined and dramatically relaxed the requirements for pendent jurisdiction.⁵⁰ Today *Gibbs* is synonymous with pendent jurisdiction.⁵¹

The standard articulated in *Gibbs* allows federal courts to exercise pendent jurisdiction whenever the plaintiff's nonfederal claim(s) are so related to the principal federal claim(s) that the entire action comprises "one constitutional 'case.'"⁵² This power is based on the implied

43. See Note, *Toward a Theory of Incidental Jurisdiction*, *supra* note 21; Comment, *Pendent and Ancillary Jurisdiction: Toward a Synthesis of Two Doctrines*, 22 UCLA L. REV. 1263, 1280 (1975) (authored by William D. Claster) [hereinafter Comment, *Toward a Synthesis of Two Doctrines*]; *infra* Part I.D.

44. *Kroger*, 437 U.S. at 370.

45. See Note, *Developing a Unified Approach*, *supra* note 5, at 532.

46. 22 U.S. (9 Wheat.) 738, 822-23 (1824).

47. See *supra* text accompanying notes 34-35.

48. See, e.g., *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 191 (1909); *Hurn v. Oursler*, 289 U.S. 238, 246 (1933).

49. 383 U.S. 715 (1966).

50. See *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349 (1988) ("The [*Gibbs*] Court intended this standard not only to clarify, but also to broaden, the scope of federal pendent jurisdiction."). See generally Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1968) (detailed discussion of the *Gibbs* decision).

51. See, e.g., *Finley v. United States*, 490 U.S. 545, 548-49 (1989) (discussion of *Gibbs* as the seminal case for pendent jurisdiction); *Carnegie-Mellon Univ.*, 484 U.S. at 348-49 (asserting that the modern doctrine of pendent jurisdiction stems from *Gibbs*).

52. *Gibbs*, 383 U.S. at 725. To determine when federal courts should exercise pendent jurisdiction, the Court provided a two-prong "power-discretion" test. See Note, *Toward a Theory of Incidental Jurisdiction*, *supra* note 21, at 1937; Comment, *Toward A Synthesis of Two Doctrines*, *supra* note 43, at 1271-72. The "power prong" requires that the court determine

constitutional authority to exercise jurisdiction over the entire case under Article III.⁵³ Elaborating on this standard, the *Gibbs* Court enumerated three criteria to determine when jurisdictional power exists:

The federal claim must have substance to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.⁵⁴

First, the plaintiff must plead a substantial federal claim "to confer subject matter jurisdiction on the court."⁵⁵ Logically, if the federal claim is unsubstantial, it defeats the court's jurisdiction at the outset, and thus the court lacks the power to exercise pendent jurisdiction over a related *nonfederal* claim.⁵⁶ This first requirement has created little controversy for courts or commentators and has been defined "with sufficient clarity."⁵⁷

Both the second and third criteria of the *Gibbs* standard demand a sufficient connection between the federal and nonfederal claims before a federal court may hear the nonfederal claim: The second cri-

whether the claims comprise one "constitutional case." *Gibbs*, 383 U.S. at 725.

Under the "discretion prong," the court uses its discretion to deny jurisdiction when circumstances warrant restraint. *Gibbs*, 383 U.S. at 726. Factors considered by courts include judicial economy, procedural convenience, fairness to litigants, comity with state tribunals, predominance of state issues, and possibility of jury confusion. *Id.* at 726-27. See, e.g., *Carnegie-Mellon Univ.*, 484 U.S. at 351 (holding that under pendent jurisdiction, federal courts have the discretion to remand a properly removed case to state court when all federal claims have been eliminated); *Moor v. County of Alameda*, 411 U.S. 693, 716 (1973) (holding that the district court appropriately considered the unsettled nature of state law and the likelihood of jury confusion in deciding not to exercise pendent jurisdiction); see also Baker, *Toward a Relaxed View of Federal Ancillary and Pendent Jurisdiction*, 33 U. PITT. L. REV. 759, 765-67 (1972) (discussing the discretionary prong of the *Gibbs* test); Schenkier, *supra* note 9, at 289-305 (extensively discussing each factor in the discretionary prong of the *Gibbs* test). Analysis of the "discretionary prong" is beyond the scope of this Note.

53. *Gibbs*, 383 U.S. at 725.

54. *Id.* (citation omitted) (emphasis in original).

55. *Id.* The definition of a substantial federal claim is stated in *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103 (1933):

[J]urisdiction, as distinguished from merits, is wanting where the claim set forth in the pleading is plainly unsubstantial . . . either because [it is] obviously without merit, or "because its unsoundness so clearly results from the previous decisions of [the Supreme C]ourt as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.

Id. at 105-06 (quoting *Hannis Distilling Co. v. Mayor of Baltimore*, 216 U.S. 285, 288 (1910)). The *Gibbs* Court relied on this definition for its analysis. *Gibbs*, 383 U.S. at 725.

56. See *Hurn v. Oursler*, 289 U.S. 238, 244-45 (1933) (noting that if the court has no jurisdiction over the federal claim, it has no jurisdiction over the related nonfederal claim).

57. Schenkier, *supra* note 9, at 262.

terion requires "a common nucleus of operative fact" between the federal and nonfederal claims; the third criterion requires that the claims ordinarily would be tried in one judicial proceeding.⁵⁸ Courts have been inconsistent, however, in determining the extent of the relation necessary to bring the nonfederal claim within their pendent power.⁵⁹ Some courts focus on the degree of factual overlap between the claims, while adopting differing guidelines of fact relatedness: some requiring only a "loose factual connection" between the claims;⁶⁰ others requiring a substantial, and sometimes complete, factual overlap.⁶¹ Still other courts focus less on whether a formula of factual relatedness has been satisfied, and instead concentrate on whether it would save the litigants time and effort if the claims were tried together.⁶² These courts have adopted a transactional approach to pendent jurisdiction,

58. *Gibbs*, 383 U.S. at 725.

59. See Matasar, *Rediscovering "One Constitutional Case,"* *supra* note 17, at 1453; Schenkier, *supra* note 9, at 261-63, 268-71; 6A C. WRIGHT, A. MILLER & M. KANE, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1588, at 535-57 (2d ed. 1990) [hereinafter *FEDERAL PRACTICE AND PROCEDURE: CIVIL*]. But see Mengler, *supra* note 8, at 273 (contending that federal courts have been "reasonably consistent" in their application of *Gibbs*).

60. See 13B *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION*, *supra* note 8, § 3567.1, at 117 (stating that the *Gibbs* test only requires a "loose factual connection"). This standard has been cited by many courts as stating the rule of law. *E.g.*, *Doe v. Bobbitt*, 682 F. Supp. 388, 389-90 (N.D. Ill. 1988); *Wicker v. First Fin. of La. Sav. & Loan Ass'n*, 665 F. Supp. 1210, 1213 (M.D. La. 1987); *Ritter v. Colorado Interstate Gas Co.*, 593 F. Supp. 1279, 1281 (D. Colo. 1984); *Frye v. Pioneer Logging Mach., Inc.*, 555 F. Supp. 730, 732 (D.S.C. 1983) (asserting that "[o]nly when the state law claim is totally different from the federal claim is there no power to hear the state claim").

61. See *Mason v. Richmond Motor Co.*, 625 F. Supp. 883, 886 (E.D. Va. 1986), *aff'd* 825 F.2d 407 (4th Cir. 1987), expressly rejecting the more liberal approach:

I think the respective judges have misread *Gibbs*. In so doing they have expanded federal jurisdiction beyond the *Gibbs* limit. Only Congress is empowered to expand the jurisdiction of the district courts. U.S. CONST. art. III, § 1. Accordingly, I must decline to follow the judges' lead. In particular, I must take exception to the concept that only a "loose factual connection" between the federal and State claims is required to empower the federal courts to exercise pendent jurisdiction. A fortiori, I wholly disagree . . . that jurisdiction exists in such cases unless the facts in the State and federal claims are "totally different." I think that a plain reading of the language in *United Mine Workers v. Gibbs* illustrates why such an interpretation is fallacious. I think that this progression from "common nucleus" to "totally different" is a paradigm of judicial lawmaking.

Id.; see also *Wilder v. Irvin*, 423 F. Supp. 639, 642-43 (N.D. Ga. 1976) (although admitting that factual overlap existed between the state and federal claim, the court refused to exercise pendent jurisdiction because "[t]he state claim will certainly not be proven by the evidence that will be offered on behalf of the federal claim.").

62. See, *e.g.*, *Kimbrough v. O'Neil*, 523 F.2d 1057, 1062-63 (7th Cir. 1975) (Stevens, J., concurring) (arguing pendent jurisdiction would be proper because the nonfederal claim arose out of the same transaction as the federal claim), *aff'd on reh'g en banc*, 545 F.2d 1059 (7th Cir. 1976); *Blake v. Town of Del. City*, 441 F. Supp. 1189, 1204 (D. Del. 1977) (holding that the court had the power to exercise jurisdiction because "one would expect the state and federal law claims to be tried together in a single judicial proceeding").

requiring only the loosest connection between the federal and non-federal claims.⁶³

Additionally, courts have been inconsistent in the relative importance they have placed on the second and third criteria.⁶⁴ Although the two criteria are almost universally accepted as independent and cumulative,⁶⁵ satisfaction of the "common nucleus" inquiry usually satisfies the single trial expectancy prong as well.⁶⁶ Generally, courts either have ignored the third requirement, or simply have cited the language without analysis.⁶⁷

Because of the inconsistency in the doctrine's application coupled with the concern that courts are exceeding their limited jurisdiction, some commentators have criticized the doctrine of pendent jurisdiction as "an anomalous—and dangerous—principle of federal jurisdiction."⁶⁸ Nevertheless, the prevailing view is that pendent jurisdiction is a necessary exercise of federal judicial power.⁶⁹

63. *Id.* See, e.g., *Kimbrough*, 523 F.2d at 1062-63; *Blake*, 441 F. Supp. at 1204. See also Schenkier, *supra* note 9, at 268-75 (arguing that a transactional approach is more consistent with the purposes behind pendent jurisdiction).

64. Schenkier, *supra* note 9, at 262. Compare *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978) (describing the *Gibbs* test simply as "a finding that federal and nonfederal claims arise from 'a common nucleus of operative fact'") with *Aldinger v. Howard*, 427 U.S. 1, 20 (1976) (Brennan, J., dissenting) (stating that "the question of Art. III power in the federal judiciary to exercise subject-matter jurisdiction concerns whether the claims asserted are such as 'would ordinarily be expected to [be tried] in one judicial proceeding'").

65. Matasar, *Rediscovering "One Constitutional Case," supra* note 17, at 1459 & n.282; 13 *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, supra* note 8, § 3567.1, at 116. At least one commentator, however, has read the second and third requirements not as cumulative, but as alternatives. Baker, *supra* note 52, at 764-65 (contending that the third requirement is "an exception or alternative to the second requirement of a 'common nucleus of operative fact'"); see also *Blake v. Town of Del. City*, 441 F. Supp. 1189, 1203-04 (D. Del. 1977) (asserting that the second requirement for the exercise of pendent jurisdiction is that "the state and federal claims must 'derive from a common nucleus of operative fact' or be such that a plaintiff 'would ordinarily be expected to try them all in one judicial proceeding'" (emphasis added). But see Schenkier, *supra* note 9, at 268 (rejecting this interpretation because it "would render the 'common nucleus' standard essentially meaningless").

66. Miller, *supra* note 8, at 3; Schenkier, *supra* note 9, at 262-63. See, e.g., *New Watch-Dog Comm. v. New York City Taxi Drivers Union*, 438 F. Supp. 1242, 1247 (S.D.N.Y. 1977).

67. Matasar, *A Pendent and Ancillary Jurisdiction Primer, supra* note 17, at 138; Mengler, *supra* note 8, at 274; Miller, *supra* note 8, at 3; see also Comment, *Toward a Synthesis of Two Doctrines, supra* note 43, at 1272 (referring to the *Gibbs* standard as a "two-part test," ignoring the third criterion).

68. Schenkier, *supra* note 9, at 248. See Comment, *Aldinger v. Howard and Pendent Jurisdiction*, 77 COLUM. L. REV. 127, 134-35 (1977) (authored by Geoffrey P. Miller); Note, *The Concept of Law-Tied Pendent Jurisdiction: Gibbs and Aldinger Reconsidered*, 87 YALE L.J. 627, 646-48 (1978).

69. See, e.g., Baker, *supra* note 52; Mengler, *supra* note 8, at 247-48; Miller, *supra* note 8; 13B *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, supra* note 8, at § 3567, at 107. But see *infra* notes 250-255 and accompanying text discussing *Finley*.

B. The Question of Pendent-Party Jurisdiction

The *Gibbs* decision had the potential to greatly expand the scope of pendent jurisdiction. The *Gibbs* Court had observed that "[u]nder the [Federal] Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties: joinder of claims, *parties* and remedies is strongly encouraged."⁷⁰ Seizing on the Court's reference to the joinder of parties, many courts applied the *Gibbs* doctrine to justify the exercise of "pendent-party jurisdiction."⁷¹ Pendent-party jurisdiction permits a plaintiff with a federal claim against one defendant to assert a factually related nonfederal claim against an additional, nondiverse defendant.⁷²

Federal courts originally applied pendent-party jurisdiction in a range of contexts.⁷³ For example, courts invoked pendent-party jurisdiction in diversity cases when diversity of citizenship existed between the plaintiff and one defendant but not between the plaintiff and another defendant.⁷⁴ This use of pendent-party jurisdiction was implicitly rejected by the Supreme Court's rationale in *Owen Equipment & Erection Co. v. Kroger*.⁷⁵ The Court reasoned that extending jurisdiction in such cases encouraged the circumvention of the com-

70. *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966) (emphasis added).

71. See 13B FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, *supra* note 8, § 3567.2, at 148-51; Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657, 662-64 (1968).

72. Generally, a plaintiff's ability to join third parties is governed by FED. R. CIV. P. 20. But see *infra* Part I.C.(2) (discussion of impleader and compulsory joinder). Federal Rule 20(a) permits the joinder of defendants when a claim asserted against them relates to or arises out of the same transaction or occurrence as the main claim, and there is some common question of law or fact between or among the parties who are to be joined and those already in the suit. FED. R. CIV. P. 20(a).

Federal Rule 20(a) also permits the joinder of *plaintiffs* under similar circumstances. See *id.* However, federal courts have not permitted pendent-party jurisdiction in this context. See, e.g., *Acton Co. v. Bachman Foods, Inc.*, 668 F.2d 76, 79-80 (1st Cir. 1982). Extending pendent jurisdiction to the joinder of a plaintiff pursuant to Federal Rule 20, as opposed to basing jurisdiction on a federal question or diversity, would permit the plaintiff to avoid completely federal jurisdictional requirements. To allow this would ignore the federal courts' *limited* jurisdiction. See *supra* notes 25-30 and accompanying text.

It should be noted that some courts have referred to the joinder of parties under Federal Rule 20 as coming within the doctrine of ancillary jurisdiction. See, e.g., *Schulman v. Huck Finn, Inc.* 472 F.2d 864, 866-67 (8th Cir. 1973); *Jacobs v. United States*, 367 F. Supp. 1275, 1277 (D. Ariz. 1973).

73. 13B FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, *supra* note 8, § 3567.2, at 148-51.

74. See *id.* Because of the complete diversity requirement, see *supra* note 21, if one plaintiff and one defendant are from the same state, a federal court must rely on pendent-party jurisdiction to hear the state claim between the nondiverse parties.

75. 437 U.S. 365 (1978). See 13B FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, *supra* note 8, § 3567.2, at 150 n.12.

plete diversity requirement.⁷⁶ Additionally, courts exercised pendent-party jurisdiction in federal question cases where a state claim asserted against a nondiverse defendant was closely related to a federal claim asserted against another defendant.⁷⁷

It was in the context of federal question jurisdiction that the Supreme Court first directly addressed the issue of pendent-party jurisdiction. In *Aldinger v. Howard*,⁷⁸ Ms. Aldinger sought to assert state claims against a county in her federal civil rights action against some of the county's officials.⁷⁹ The different claims clearly arose out of a common nucleus of operative fact because the state law claims against the county were based solely on the county's vicarious liability arising from its officials' tortious conduct. Since diversity did not exist between the plaintiff and the county, a state-claim defendant, an independent basis of federal jurisdiction was not established.⁸⁰ Ms. Aldinger argued that, based on pendent jurisdiction and the use of ancillary jurisdiction to add parties, her request for the court to exercise pendent-party jurisdiction would satisfy the *Gibbs* test on its face.⁸¹ The Court rejected Ms. Aldinger's contention, refusing to formulate any "general, all-encompassing jurisdictional rule" regarding the use of pendent and ancillary jurisdiction.⁸²

The Court distinguished pendent-claim from pendent-party jurisdiction. It asserted that "[t]he situation with respect to the joining of a new party . . . strikes us as being both factually and legally different from the situation facing the Court in *Gibbs* and its predecessors."⁸³ The Court explained:

From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which

76. See *Kroger*, 437 U.S. at 374-77; see also Bratton, *Pendent Jurisdiction in Diversity Cases—Some Doubts*, 11 SAN DIEGO L. REV. 296, 300-18 (1974) (questioning the applicability of pendent-party jurisdiction in diversity cases).

77. See, e.g., *Schulman v. Huck Finn, Inc.*, 472 F.2d 864, 866 (8th Cir. 1973); *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 809 (2d Cir. 1971); *Connecticut Gen. Life Ins. Co. v. Craton*, 405 F.2d 41, 48 (5th Cir. 1968); see also 13B FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, *supra* note 8, § 3567.2, at 150-51 & n.13.

78. 427 U.S. 1 (1976).

79. *Id.* at 4-5.

80. The accepted interpretation of 42 U.S.C. § 1983 at the time of the *Aldinger* decision was that a municipal corporation was not a "person" within the meaning of § 1983, and thus a plaintiff could not assert a federal civil rights claim against a country. *Id.* at 16 (citing *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled sub nom.* *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658 (1978)); see *infra* note 86.

81. *Id.* at 12-13. This request was not so very unusual because prior to *Aldinger*, lower federal courts allowed such an exercise of pendent jurisdiction. See *supra* note 77 and accompanying text.

82. *Aldinger*, 427 U.S. at 13.

83. *Id.* at 14.

the court has jurisdiction, to litigate in addition to their federal claim a state-law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant "derive from a common nucleus of operative fact." . . . [T]he addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress.⁸⁴

Because the federal and state courts had concurrent jurisdiction over the federal claims, the Court found that the efficiency of resolving the controversy in a single lawsuit could be achieved by suing in state court, where the state and federal claims could be joined.⁸⁵

The Court also discussed the significant legal difference between pendent-claim and pendent-party jurisdiction. It stressed that the addition of parties, as opposed to the addition of claims, created unique statutory jurisdictional considerations:

In *Osborn* and *Gibbs* Congress was silent on the extent to which the defendant, already properly in federal court under a statute, might be called upon to answer nonfederal questions or claims; the way was thus left open for the Court to fashion its own rules under the general language of Art. III. But the extension of *Gibbs* to this kind of "pendent party" jurisdiction—bringing in an additional defendant at the behest of the plaintiff—presents rather different statutory jurisdictional considerations. Petitioner's contention . . . must be decided, not in the context of congressional silence or tacit encouragement, but in quite the opposite context. The question here, which it was not necessary to address in *Gibbs* or *Osborn*, is whether by virtue of the statutory grant of subject-matter jurisdiction, upon which petitioner's principal claim against the treasurer rests, Congress has addressed itself to the *party* as to whom jurisdiction pendent to the principal claim is sought. And it undoubtedly has done so.⁸⁶

Thus, the Supreme Court in *Aldinger* for the first time focused on the need for a statutory basis for pendent jurisdiction, at least when additional parties were involved. This analysis added an additional inquiry under the "power prong" of the *Gibbs* analysis. Before a federal court may exercise pendent-party jurisdiction, the Court held that it must determine whether "Congress in the statutes conferring ju-

84. *Id.* at 14-15 (citations omitted).

85. *Id.* at 15.

86. *Id.* at 15-16.

risdiction has not expressly or by implication negated its existence.”⁸⁷ In other words, federal courts could exercise pendent-party jurisdiction *unless* Congress had denied jurisdiction. Under its new analytical framework, the Court found that Congress had *excluded* counties from liability in section 1983, and thus, “the scope of that ‘civil action’ . . . should not be so broadly read as to bring [counties] *back* within [the court’s jurisdictional] power merely because the facts also give rise to an ordinary civil action against them under state law.”⁸⁸

The *Aldinger* opinion intentionally was narrowly written.⁸⁹ The Court did not allow the exercise of pendent-party jurisdiction in this context, but in dicta it left open the possibility that exclusive federal jurisdiction in itself might be enough to permit jurisdiction.⁹⁰ Additionally, even though the facts of *Aldinger* created the possibility for a broad-sweeping decision, the Court avoided a decision on the relationship between pendent and ancillary jurisdiction: “Given the

87. *Id.* at 18. Although the *Aldinger* statutory inquiry may be considered a third prong to the *Gibbs* “power-discretion” test, it may be viewed more appropriately as a fourth step under the “power prong.” See *supra* note 52. In determining whether a federal court has the power to exercise pendent-party jurisdiction, the court must ask four questions: (1) Whether there is a substantial federal claim, *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); (2) whether the state and federal claims arise from “a common nucleus of operative fact,” *id.*; (3) whether the state and federal claims would ordinarily be tried in one judicial proceeding, *id.*; and (4) whether Congress has expressly or implicitly negated its existence in the jurisdictional statute, *Aldinger*, 427 U.S. at 18. The first three inquiries relate to the constitutional authorization to exercise jurisdiction. The final inquiry relates to the statutory authorization.

88. *Aldinger*, 427 U.S. at 17 (emphasis in original). *Monroe v. Pape*, 365 U.S. 167 (1961), served as the basis for the *Aldinger* holding that 28 U.S.C. § 1343(3) implicitly negated the exercise of pendent-party jurisdiction over a state claim against a county. *Monroe* was overruled two years after *Aldinger* in *Monell v. New York City Dep’t of Social Serv.*, 436 U.S. 658, 663 (1978). This ruling, however, does not qualify the *Aldinger* holding that the jurisdictional questions presented are statutory as well as constitutional, “a point on which the dissenters in *Aldinger* agreed.” *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372 n.12 (1978).

89. See *Aldinger*, 427 U.S. at 18 (“we decide here only the issue of so-called ‘pendent party’ jurisdiction with respect to a claim brought under §§ 1343(3) and 1983”).

90. *Id.* (“When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States . . . the argument of judicial economy and convenience can be coupled with the additional argument that *only* in federal court may all the claims be tried together.”). Claims within the exclusive jurisdiction of federal courts include those under the federal antitrust laws, 15 U.S.C. §§ 15(a), 26 (1988), patent laws, 28 U.S.C. § 1338(a) (1988), securities laws, 15 U.S.C. § 78aa (1988), admiralty laws, 28 U.S.C. § 1333 (1988); and the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1988).

Most courts after *Aldinger*, in accordance with this dicta, allowed the joinder of pendent parties when they had exclusive federal jurisdiction. See, e.g., *Lykins v. Pointer, Inc.*, 725 F.2d 645, 647 (11th Cir. 1984) (action brought under the Federal Tort Claims Act); *In re Oil Spill by the Amoco Cadiz Off the Coast of France*, 699 F.2d 909, 913-14 (7th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983) (case in admiralty); *Dick Meyers Towing Serv., Inc. v. United States*, 577 F.2d 1023, 1024 (5th Cir. 1979), *cert. denied*, 440 U.S. 908 (1978) (Federal Tort Claims Act action); *Lee Const. Co. v. Federal Reserve Bank*, 558 F. Supp. 165, 170-72 (D. Md. 1982) (action brought against the Federal Reserve Bank).

complexities of the many manifestations of federal jurisdiction, . . . there is little profit in attempting to decide . . . whether there are any 'principled' differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences."⁹¹ Thus, *Aldinger* left open the question of whether the statutory inquiry required for pendent-party jurisdiction is also required for pendent-claim and ancillary jurisdiction.

C. Ancillary Jurisdiction

Although the doctrines of pendent and ancillary jurisdiction arose from the same source,⁹² the development of ancillary jurisdiction has followed a different course.⁹³ The modern scope of ancillary jurisdiction originated in *Moore v. New York Cotton Exchange*.⁹⁴ In *Moore*, the Court seemed to authorize broad-based ancillary jurisdiction over any nonfederal claims with a close factual connection to the pending federal claims.⁹⁵ Emphasis was placed "not so much upon the immediateness of [the] connection as upon [the] logical relationship."⁹⁶ The major expansion of ancillary jurisdiction, however, occurred after the adoption of the Federal Rules of Civil Procedure.⁹⁷ Although Federal Rule 82 explicitly states that the Rules "shall not be construed to extend or limit the jurisdiction of the United States district courts,"⁹⁸ in practice the content of a federal "civil action" has been broadened by the joinder devices available under the Federal Rules.⁹⁹ This development has led some commentators to view ancillary jurisdiction as a by-product of the Federal Rules.¹⁰⁰

91. *Aldinger*, 427 U.S. at 13.

92. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

93. Originally, ancillary jurisdiction was restricted essentially to situations of necessity. See *Fulton Nat'l Bank v. Hozier*, 267 U.S. 276, 280 (1925); *Freeman v. Howe*, 65 U.S. (24 How.) 450, 459-60 (1860) (ancillary jurisdiction in cases involving claims to property within the federal court's exclusive jurisdiction); see also 13 FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, *supra* note 8, § 3523, at 87-89, 93-94 (discussing ancillary jurisdiction in instances of virtual necessity).

94. 270 U.S. 593 (1926).

95. *Id.* at 609-10.

96. *Id.* at 610; see also *infra* notes 105-109 and accompanying text (discussing the "logical relationship" approach to defining ancillary jurisdiction limitations).

97. See *Brandt v. Olson*, 179 F. Supp. 363, 370 (N.D. Iowa 1959); *Baker*, *supra* note 52, at 759; Note, *Ancillary Jurisdiction of the Federal Courts*, 48 IOWA L. REV. 383, 385 (1963).

98. FED. R. CIV. P. 82.

99. In fact, the joinder rules would lose much of their practical utility if ancillary jurisdiction were not available. See *Brandt*, 179 F. Supp. at 370; 13 FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, *supra* note 8, § 3523, at 94-95.

100. See *Goldberg, The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 395, 418-20 (1976); *Miller*, *supra* note 8, at 5; *Perdue*, *supra* note 12, at 544.

Like the inconsistency found in the interpretations of a "pendent" claim under the *Gibbs* analysis,¹⁰¹ case law offers little direction as to what constitutes an "ancillary" claim.¹⁰² Generally, courts have labeled a nonfederal claim "ancillary" when it arises out of "the same transaction[s] or occurrence[s]," as the main federal claim.¹⁰³ This concept, however, has never been clearly defined.¹⁰⁴

Many courts adopting a liberal approach hold that claims arise from the same transaction or occurrence when there exists a "logical relationship" between the federal and nonfederal claim.¹⁰⁵ Even this approach, however, has not been interpreted consistently. The Fifth Circuit, for example, has held that a "logical relationship" is found only if the claims arise from "the same aggregate of operative facts" or if "the aggregate core of facts upon which the original claim rests activates additional legal rights in a party defendant that would otherwise be dormant."¹⁰⁶ In contrast, the Third Circuit has found a "log-

101. See *supra* notes 59-67 and accompanying text.

102. See, e.g., *Morrow v. District of Columbia*, 417 F.2d 728, 739 (D.C. Cir. 1969) (finding "no clear or systematic limitation on, or definitions of, ancillary jurisdiction"); *Walmac Co. v. Isaacs*, 220 F.2d 108, 113 (1st Cir. 1955) (noting that "ancillary jurisdiction is not capable of exact definition"); *Lesnik v. Public Indus. Corp.*, 144 F.2d 968, 974 (2d Cir. 1944) (criticizing ancillary jurisdiction as "amorphous"); *Brandt*, 179 F. Supp. at 370 ("examination and re-examination disclosed to many . . . courts that their ancillary jurisdiction was much broader and much more elastic than it had previously been understood to be").

103. See *Moore v. New York Cotton Exchange*, 270 U.S. 593, 609-10 (1926); see also *Glens Falls Indem. Co. v. United States*, 229 F.2d 370, 373-74 (9th Cir. 1956); *Schenkier*, *supra* note 9, at 278 n.170 (noting that "*Moore* has been construed as creating a 'transactional' test for the exercise of ancillary jurisdiction").

104. See 7 FEDERAL PRACTICE AND PROCEDURE: CIVIL, *supra* note 59, § 1653, at 382 (noting that most courts have used a case-by-case approach in determining whether the joinder of parties should be permitted, rather than adopting generalized formulas to determine what factual relationships are considered the same transaction or occurrence).

The definition of what constitutes a "transaction or occurrence" is generally used by the court to limit ancillary jurisdiction. Compare *Lasa per L'Industria del Marmo Societa per Azioni v. Southern Builders, Inc.*, 45 F.R.D. 435, 440 (W.D. Tenn. 1967) (narrowly defining transaction as the specific contract between the plaintiff and defendant) with the Sixth Circuit opinion reversing it, *Lasa per L'Industria del Marmo Societa per Azioni v. Alexander*, 414 F.2d 143, 147 (6th Cir. 1969) (defining transaction as all disputes arising out of the construction project involved). Thus, although the exercise of ancillary jurisdiction is discretionary, see, e.g., *Chelsey v. Union Carbide Corp.*, 927 F.2d 60, 65-66 (2d Cir. 1991), courts rarely decline to extend jurisdiction. See 13 FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, *supra* note 8, § 3523, at 105-06.

105. This approach was first expressed in *Moore*, 270 U.S. at 610, when the Court stated: "'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." *Id.* (emphasis added). See also *United Artists Corp. v. Masterpiece Prod., Inc.*, 221 F.2d 213, 216 (2d Cir. 1955) (citing and quoting *Moore*, 270 U.S. at 610); *Mengler*, *supra* note 8, at 274 n.132 (noting that the "arising 'out of the transaction or occurrence'" language of the Federal Rules requires a "logical relationship").

106. *Revere Corp. & Brass, Inc. v. Aetna Casualty & Sur. Co.*, 426 F.2d 709, 715 (5th

ical relationship" when duplicate litigation would result from separate trials on each claim.¹⁰⁷ The Third Circuit formulation is far broader than the Fifth Circuit's. The Fifth Circuit requires a substantial overlap of facts between or among the claims,¹⁰⁸ whereas the Third Circuit focuses on considerations of judicial economy and convenience.¹⁰⁹ Some courts have criticized the "logical relationship" test as being overly broad in scope and uncertain in its application.¹¹⁰ Such criticism, however, probably depends upon which interpretation of "logical relationship" the court relies.

Some lower federal courts have adopted alternative approaches to the "logical relationship" definition of the "same transaction or occurrence" test. These approaches include the "identity of issues" test,¹¹¹ the "identity of evidence" test,¹¹² and the "res judicata" test.¹¹³

Cir. 1970). This approach is reminiscent of the strict interpretation of the *Gibbs* "common nucleus of operative fact" requirement. See *supra* notes 58-61 and accompanying text.

107. *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3d Cir. 1961). This approach is similar to the *Gibbs* single trial expectancy requirement. See *supra* notes 58-67 and accompanying text.

108. See *Revere Corp. & Brass, Inc.*, 426 F.2d at 715.

109. See *Great Lakes Rubber Corp.*, 286 F.2d at 634; see also *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057 (2d Cir. 1977), *cert denied*, 434 U.S. 1035 (1978), in which the Second Circuit held:

Since a compulsory counterclaim is by definition closely related to the subject matter of the opposing party's claims, common sense and judicial economy compel the conclusion that such claims should be tried together and the extension of ancillary jurisdiction . . . is consistent with Article III's grant of jurisdiction over "cases" arising under the Constitution and federal laws.

Id. at 1071; *Lasa per L'Industria del Marmo Societa per Azioni v. Alexander*, 414 F.2d 143, 147 (6th Cir. 1969) (interpreting "logical relationship," and thus "transaction or occurrence" liberally "in order to avoid multiplicity of litigation"); *Albright v. Gates*, 362 F.2d 928, 929 (9th Cir. 1966) (noting that "transaction" must be liberally construed, and emphasizing the avoidance of duplicating judicial effort).

110. See, e.g., *Bose Corp. v. Consumers Union of the United States, Inc.*, 384 F. Supp. 600, 603 (D. Mass. 1974).

111. Under this test, ancillary jurisdiction is exercised when the issues of fact and law between two claims are similar enough to arise from the same transaction or occurrence. See, e.g., *Whigham v. Beneficial Fin. Co. of Fayetteville*, 599 F.2d 1322, 1323 (4th Cir. 1979); *Connecticut Indem. Co. v. Lee*, 168 F.2d 420, 423 (1st Cir. 1948). Although a complete overlap of law and fact is not required, this strict test has the potential to narrow the scope of ancillary jurisdiction.

112. Under the identity of evidence approach, courts will exercise ancillary jurisdiction when the evidence needed to establish the two claims is substantially the same. See, e.g., *Columbia Plaza Corp. v. Security Nat'l Bank*, 525 F.2d 620, 621 (D.C. Cir. 1975); *Non-Ferrous Metals v. Sarnamar Aluminum Co.*, 25 F.R.D. 102, 105 (N.D. Ohio 1960).

113. Under the *res judicata* approach, the court determines whether *res judicata* would bar the party from raising the nonfederal claim in a subsequent state court suit. See, e.g., *Beach v. KDI Corp.*, 490 F.2d 1312, 1314 (3d Cir. 1974); *Libbey-Owens-Ford Glass Co. v. Sylvania Indus. Corp.*, 154 F.2d 814, 818 (2d Cir.) (Frank, J., dissenting), *cert. denied*, 328 U.S. 859 (1946). In the case of ancillary jurisdiction over an additional party, the relevant issue is whether the nonparty is bound by the judgment entered in her absence.

Although these tests apply in a minority of jurisdictions, they have added greatly to the confusion surrounding the application of ancillary jurisdiction.

In *Owen Equipment and Erection Co. v. Kroger*,¹¹⁴ the Supreme Court introduced another approach for determining whether to exercise ancillary jurisdiction over additional parties. The Court asserted that for a nonfederal claim to be "ancillary" it had to be logically dependent on the main federal claim.¹¹⁵ A nonfederal claim is logically dependent on a federal claim when it relies upon the outcome, not the source, of the federal claim.¹¹⁶ This formulation appears to be unduly restrictive and commentators have found the logical dependence reasoning to be flawed.¹¹⁷ Compulsory counterclaims and cross-claims, for example, are not always logically dependent on the resolution of the plaintiff's claim, yet they universally are recognized as falling within the federal courts' ancillary jurisdiction.¹¹⁸

Independent of the confusion surrounding the appropriate standard for the use of ancillary jurisdiction, unique problems have arisen in the application of ancillary jurisdiction to the Federal Rules' joinder provisions. The relevant contexts include: counterclaims and cross-claims, impleader, and compulsory party joinder and intervention.

(1) *Ancillary Jurisdiction Over Counterclaims and Cross-Claims*

Notwithstanding the confusion surrounding the definition of an "ancillary" claim, the exercise of ancillary jurisdiction over nonfederal claims between *existing* parties has created universally accepted rules. First, ancillary jurisdiction has been used by courts to hear compulsory counterclaims pursuant to Federal Rule 13(a).¹¹⁹ Under Federal

114. 437 U.S. 365 (1978).

115. *Id.* at 376.

116. *See id.* An example is when a defendant impleads a third party who "is or may be liable for all or part of the plaintiff's claim" against the defendant. FED. R. CIV. P. 14(a).

117. *See, e.g.,* Freer, *supra* note 17, at 70; Matasar, *A Pendent and Ancillary Jurisdiction Primer*, *supra* note 17, at 171-72.

118. *Id.* *See* 13 FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, *supra* note 8, § 3523, at 101-02 (arguing that federal courts should downplay the "logical dependence" factor of the *Kroger* ancillary jurisdiction analysis because compulsory counterclaims and cross-claims are not always "logically dependent").

119. A counterclaim is any affirmative claim for relief usually asserted by the defendant, in the defensive pleadings against an opposing party, usually the plaintiff. FED. R. CIV. P. 13(a). *See, e.g.,* Moor v. County of Alameda, 411 U.S. 693, 714-15 (1973). The universal acceptance of ancillary jurisdiction in the context of Federal Rule 13(a) has included counterclaims that are compulsory to other compulsory counterclaims. *See, e.g.,* Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 633 (3d Cir. 1961) (exercise of ancillary jurisdiction over plaintiff's compulsory counterclaim to defendant's federal counterclaim was proper).

Rule 13(a), a counterclaim is compulsory if it "arises out of the transaction or occurrence that is the subject of the opposing party's claim."¹²⁰ Because a nonfederal claim is "ancillary" when it arises out of "the same transaction or occurrence" as the main federal claim,¹²¹ by definition, federal courts may exercise ancillary jurisdiction over compulsory counterclaims.¹²² Similarly, ancillary jurisdiction has been universally accepted over cross-claims pursuant to Federal Rule 13(g).¹²³

(2) *Ancillary Jurisdiction in the Context of Impleader*

Ancillary jurisdiction over Federal Rule 14 impleader claims¹²⁴ has raised difficult questions. Much of this difficulty was due to the Su-

120. FED. R. CIV. P. 13(a).

121. See *supra* note 103 and accompanying text.

122. See, e.g., *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1071 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

Permissive counterclaims, on the other hand, are those claims not arising from the same transaction or occurrence as the main claim. FED. R. CIV. P. 13(b). Thus, in order to exercise jurisdiction over a permissive counterclaim, federal courts must find an independent source of jurisdiction. See, e.g., *Maddox v. Kentucky Fin. Co.*, 736 F.2d 380, 380 (6th Cir. 1984); *McCaffrey v. Rex Motor Transp., Inc.*, 672 F.2d 246, 247 (1st Cir. 1982); *Whigham v. Beneficial Fin. Co.*, 599 F.2d 1322, 1322 (4th Cir. 1979); *Pipeline Local Union No. 798 v. Ellerd*, 503 F.2d 1193, 1198 (10th Cir. 1974); *United States ex rel. D'Agostino Excavators, Inc. v. Heyward-Robinson Co.*, 430 F.2d 1077, 1080-81 (2d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971). See *Fraser, Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 28-29 (1963) [hereinafter *Fraser, Ancillary Jurisdiction and the Joinder of Claims*]. Some courts, however, have developed an exception to this general rule and permit ancillary jurisdiction over a permissive counterclaim for set-off purposes. E.g., *Abromovage v. United Mine Workers*, 726 F.2d 972, 988-89 (3d Cir. 1984). See also *Fraser, Ancillary Jurisdiction and the Joinder of Claims, supra*, at 31-34. This exception does not allow affirmative relief on a permissive counterclaim through ancillary jurisdiction. See 6 *FEDERAL PRACTICE AND PROCEDURE: CIVIL, supra* note 59, § 1422, at 175-77.

123. FED. R. CIV. P. 13(g). See, e.g., *Danner v. Himmelfarb*, 858 F.2d 515, 521 (9th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989); *Amco Constr. Co., v. Mississippi State Bldg. Comm'n*, 602 F.2d 730, 731 (5th Cir. 1979); *Lasa per L'Industria del Marmo Societa per Azioni v. Alexander*, 414 F.2d 143, 146 (6th Cir. 1969); *Atlantic Corp. v. United States*, 311 F.2d 907, 910 (1st Cir. 1962); *City of Boston v. Boston Edison Co.*, 260 F.2d 872, 874-75 (1st Cir. 1958).

A cross-claim is any claim asserted by one party in a *defensive* position against another coparty "arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action." FED. R. CIV. P. 13(g). By definition, a plaintiff may assert a cross-claim against another plaintiff *only if* the defendant asserts a counterclaim against that plaintiff. See, e.g., *Danner v. Anskis*, 256 F.2d 123, 124 (3d Cir. 1958) ("a cross-claim is intended to state a claim which is ancillary to a claim stated in a complaint or counterclaim which has previously been filed *against* the party stating the cross-claim") (emphasis added). Thus, a plaintiff cannot assert a cross-claim against a coplaintiff arising out of the same transaction or occurrence as her claim against the defendant.

124. The traditional impleader scenario involves a defendant, as a third-party plaintiff, who brings a third party defendant into the litigation "who is or may be liable to him for all or part of the plaintiff's claim against him." FED. R. CIV. P. 14(a).

preme Court's decision in *Owen Equipment & Erection Co. v. Kroger*.¹²⁵

In *Kroger*, the plaintiff, an Iowa resident, sued a Nebraska company in federal court on the basis of diversity jurisdiction. The Nebraska company filed a third-party claim, under Federal Rule 14(a), against Owen Equipment & Erection Company ("Owen").¹²⁶ Ms. Kroger then amended her complaint, adding a claim against Owen, the third-party defendant. The Nebraska company was granted summary judgment, leaving only the claim between Ms. Kroger and Owen.¹²⁷ During trial the court discovered that Owen's principal place of business was in Iowa and not Nebraska, thus destroying diversity of citizenship as the basis for federal jurisdiction.¹²⁸ The Supreme Court held that, in a diversity case, a federal court does not have ancillary jurisdiction over a *plaintiff's* state claim against a nondiverse third-party defendant.¹²⁹ Because Ms. Kroger could not establish an independent basis for jurisdiction, she was unable to assert her claim against Owen.

The *Kroger* Court adopted the *Aldinger* statutory inquiry to determine whether the court had the power to exercise ancillary jurisdiction.¹³⁰ The Court noted that the *Gibbs* constitutional test, although satisfied, was not the end of the inquiry; ancillary jurisdiction also had statutory limitations.¹³¹ The statutory inquiry, the *Kroger* Court explained, required an examination of both the congressional intent behind the statute conferring federal jurisdiction¹³² and the "*posture*" of the party asserting ancillary jurisdiction.¹³³

The Court held that allowing ancillary jurisdiction over the plaintiff's claim against a nondiverse third-party defendant would flout the congressional intent of complete diversity underlying section 1332.¹³⁴

125. 437 U.S. 365 (1978).

126. *Id.* at 367-77. Ancillary jurisdiction exists over claims brought by the original defendant against a third-party defendant; the Supreme Court has described this principle as "well-established doctrine." *Moor v. County of Alameda*, 411 U.S. 693, 714 (1973). *Kroger* did not question this exercise of ancillary jurisdiction but distinguished it from the claim before it. *Kroger*, 437 U.S. at 375 & n.18. See *infra* text accompanying notes 144-145; see also *Horton v. Baldwin*, 713 F. Supp. 508, 509 (D.D.C. 1989) (allowing the assertion of a third-party claim in a diversity action).

127. *Kroger*, 437 U.S. at 365.

128. *Id.* at 367-69.

129. *Id.* at 372-77.

130. *Id.* at 372-76. See *supra* note 87 and accompanying text.

131. *Kroger*, 437 U.S. at 372-73.

132. *Id.* at 373-75.

133. *Id.* at 375-77. Thus, a defending party who is haled into court involuntarily is in a defensive posture and should be treated more leniently than a plaintiff who is in an offensive posture because she chose the federal forum. *Id.* at 376-77. See *infra* text accompanying notes 142-145.

134. *Id.* at 374-77.

A plaintiff, the Court reasoned, could circumvent the requirement of complete diversity by "the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants."¹³⁵ In other words, plaintiffs are barred from asserting claims against a third-party defendant through the indirect route of Federal Rule 14(a) when they could not assert the claim directly. The Court acknowledged that Federal Rule 14 allows the assertion of such claims,¹³⁶ but noted that the federal rules cannot expand federal subject matter jurisdiction.¹³⁷

Commentators have criticized the *Kroger* Court for denying ancillary jurisdiction over plaintiff's offensive claims against third party defendants.¹³⁸ As one commentator has argued, "The objection that the plaintiff is doing indirectly what he cannot do directly is without merit because he does not bring the third-party defendant into the action. The plaintiff can assert a claim against the third-party defendant only if the original defendant should bring him into the action."¹³⁹ Some have suggested that any abuse of the third-party practice could be remedied by section 1359 of Title 28, which forbids collusive attempts to create federal jurisdiction.¹⁴⁰ The Supreme Court rejected this argument in *Kroger*.¹⁴¹

Additionally, the *Kroger* Court focused on the "posture" of the party asserting the nonfederal claim to determine if extending ancillary jurisdiction was improper.¹⁴² In *Kroger*, the party seeking to invoke ancillary jurisdiction over the nondiverse third party was in an offensive posture. The Court reasoned that because Ms. Kroger chose

135. *Id.* at 374.

136. *Id.* Federal Rule 14(a) provides that a plaintiff may assert any claim against a third-party defendant arising out of the same transaction or occurrence as the plaintiff's claim against the original defendant. FED. R. CIV. P. 14(a).

137. *Kroger*, 437 U.S. at 371; see FED. R. CIV. P. 82.

138. See, e.g., Fraser, *Ancillary Jurisdiction and the Joinder of Claims*, *supra* note 122 at 42 (1946 amendment to Federal Rule 14 diminishes the possibility of collusion); Garvey, *The Limits of Ancillary Jurisdiction*, 57 TEX. L. REV. 697, 697 (1979) (the line drawn by *Kroger* is inconsistent with justifications of fairness, economy and convenience underlying ancillary jurisdiction); Miller, *supra* note 8, at 8-9 (arguing the possibility of plaintiff collusion is remote); see also *Kroger*, 437 U.S. at 381-83 (White, J., dissenting).

139. Fraser, *Ancillary Jurisdiction and the Joinder of Claims*, *supra* note 122, at 42; see also Garvey, *supra* note 138, at 703-05 (questioning whether a plaintiff would risk waiting for defendants to implead parties under Federal Rule 14 in order to assert their claims against them).

140. See, e.g., *Kroger*, 437 U.S. at 383 (White, J., dissenting); Note, *Rule 14 Claims and Ancillary Jurisdiction*, 57 VA. L. REV. 265, 274-75 (1971) (authored by T.D.N.).

141. 437 U.S. at 375 n.17 (noting that there is nothing necessarily "collusive" about either the plaintiff's or the defendant's actions in bringing claims against impleaded third parties).

142. *Id.* at 375-76.

to bring her case in federal court, she had to adhere to the limitations on federal subject matter jurisdiction.¹⁴³

In contrast, ancillary jurisdiction "typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court."¹⁴⁴ Thus, the Court emphasized that fairness to the party in a defensive posture should aid the court in construing the jurisdictional statute.¹⁴⁵

The *Kroger* Court's analysis gave rise to additional inquiries in the context of impleader. Federal Rule 14(a) authorizes many types of claims other than the traditional third-party claim. For example, the third-party defendant may implead another party to the action who may be liable to her for all or part of the third-party plaintiff's claim.¹⁴⁶ The third-party defendant also may assert a claim against the original plaintiff¹⁴⁷ or defendant¹⁴⁸ that arises out of the same transaction or occurrence as the main claim. Presumably, ancillary jurisdiction in these contexts remained unscathed after *Kroger*, because in all of the situations above, the parties invoking ancillary jurisdiction are in the *defensive* posture.

Two additional exercises of ancillary jurisdiction under Federal Rule 14 were brought into question after *Kroger*. First, when a third-party defendant invokes ancillary jurisdiction by asserting a transactionally related claim against the original plaintiff, Federal Rule 14(a) allows the plaintiff to assert a compulsory counterclaim to the third-party defendant's claim.¹⁴⁹ At least one district court has extended ancillary jurisdiction in this context.¹⁵⁰ Second, when a defendant raises a compulsory counterclaim against the plaintiff, Federal Rule 14(b) provides that the *plaintiff* may implead a third party who may be liable

143. *Id.* at 376.

144. *Id.*

145. *Id.* at 376-77; Note, *Toward a Theory of Incidental Jurisdiction*, *supra* note 21, at 1940.

146. FED. R. CIV. P. 14(a).

147. *Id.* Federal courts have exercised ancillary jurisdiction over third-party defendants' claims against the original plaintiff if the third-party's claim arose from the same transaction or occurrence as the plaintiff's original claim. *E.g.*, *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 960 (7th Cir. 1982), *cert. denied*, 459 U.S. 1017 (1982); *Revere Copper & Brass, Inc. v. Aetna Casualty & Sur. Co.*, 426 F.2d 709, 709 (5th Cir. 1970); *Union Bank & Trust Co. v. St. Paul Fire & Marine Ins. Co.*, 38 F.R.D. 486, 489 (D. Neb. 1965); *Heintz & Co. v. Provident Tradesmens Bank & Trust Co.*, 30 F.R.D. 171, 172 (E.D. Pa. 1962).

148. FED. R. CIV. P. 14(a). Federal courts have invoked ancillary jurisdiction when a third-party defendant has filed a compulsory counterclaim against the third-party plaintiff (the original defendant). *E.g.*, *Weber v. Weber*, 44 F.R.D. 227, 229-31 (E.D. Pa. 1968).

149. FED. R. CIV. P. 14(a).

150. *Hyman-Michaels Co. v. Swiss Bank Corp.*, 496 F. Supp. 663, 666 (N.D. Ill. 1980).

to her for all or part of the defendant's claim.¹⁵¹ In this context, at least two district courts have allowed ancillary jurisdiction.¹⁵² These courts distinguished *Kroger*, reasoning that the plaintiff had impleaded the nondiverse third-party as a defense to the defendant's counterclaim rather than as a strategic attempt to circumvent the diversity requirements.¹⁵³

(3) *The Unique Ancillary Jurisdiction Problems in the Contexts of Compulsory Party Joinder and Intervention*

Compulsory party joinder under Federal Rule 19 and its relation to intervention of right under Federal Rule 24(a) have created unique ancillary jurisdiction problems. Compulsory party joinder involves the joinder of persons who are necessary for a just and complete adjudication.¹⁵⁴ In contrast to permissive joinder,¹⁵⁵ compulsory joinder includes those nonparties whose absence threatens to cause judicial inefficiency and other undesirable consequences.¹⁵⁶ Under Federal Rule

151. FED. R. CIV. P. 14(b).

152. See, e.g., *Basic Mach. Co. v. Ketom Constr., Inc.*, 686 F. Supp. 542, 543-44 (M.D.N.C. 1988); *Brown & Caldwell v. Institute for Energy Funding, Ltd.*, 617 F. Supp. 649, 651 (C.D. Cal. 1985).

153. *Brown & Caldwell*, 617 F. Supp. at 651. The court further reasoned that the plaintiff would not logically have included the impleaded third-party as a defendant in the initial action as the third-party's alleged liability depended on the plaintiff's liability to the defendants on their counterclaim. *Id.*

154. The title of FED. R. CIV. P. 19 reads "Joinder of Persons Needed for Just Adjudication." For a detailed discussion of Federal Rule 19, see 7 FEDERAL PRACTICE AND PROCEDURE: CIVIL, *supra* note 59, §§ 1601-1626. Additionally, FED. R. CIV. P. 13(h) provides, "Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20." Thus, the rules governing ancillary jurisdiction in the context of Rule 19 joinder equally apply to the addition of parties to counterclaims and cross-claims.

155. Permissive joinder is governed by FED. R. CIV. P. 20. See *supra* note 72.

156. Under Federal Rule 19(a) a nonparty must be joined where feasible if:

(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

FED. R. CIV. P. 19(a). Thus, to determine whether an absentee's joinder should be compelled—whether the nonparty is "necessary"—a court must evaluate the strength of the nonparty's interest in the pending litigation and whether her absence would threaten some aspect of the litigation. This flexible approach under the Federal Rules requires a careful balancing of competing interests. See, e.g., *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109-11 (1968).

19(a), the federal court will order such persons joined "if [f]easible."¹⁵⁷ If joinder is not feasible, the action must be dismissed if "in equity and good conscience" the court cannot proceed without those persons.¹⁵⁸

Generally, federal courts have denied ancillary jurisdiction and refused to join nondiverse parties. The issue typically arises when the addition of the new party would destroy diversity jurisdiction. Under the *Kroger* rationale, courts have emphasized the complete diversity requirement in denying ancillary jurisdiction over necessary parties joined under Federal Rule 19(a).¹⁵⁹ In *Acton Co. v. Bachman Foods, Inc.*,¹⁶⁰ for example, Acton's subsidiary brought a diversity action in federal court seeking a declaratory judgment regarding an agreement between the defendant and Acton. The subsidiary then sought Acton's joinder under Federal Rule 19. Although the subsidiary and defendant were diverse, Acton and the defendant were nondiverse. The First Circuit held that allowing Acton to join as a plaintiff and bring a state claim against the nondiverse defendant would allow Acton and its subsidiary to circumvent the complete diversity requirement by omitting Acton from the original complaint and then waiting for Acton to be joined under Federal Rule 19.¹⁶¹

The *Kroger* rationale, however, does not explain all cases denying ancillary jurisdiction over Federal Rule 19 parties. For example, if the plaintiff has no interest in bringing a claim against a necessary party defendant, she may file in federal court to avoid litigating a complete controversy.¹⁶² As Professor Mengler has noted, "Ancillary jurisdiction, if applied to these circumstances, could ensure complete justice without undermining *Kroger's* allegiance to complete diversity."¹⁶³

When it is infeasible to join a necessary nonparty, the court must determine whether the nonparty is "indispensable."¹⁶⁴ In a diversity

157. FED. R. CIV. P. 19(a). Joinder is "feasible" when the absentee is subject to service of process and her joinder would not deprive the federal court of subject matter jurisdiction. *Id.*

158. FED. R. CIV. P. 19(b). Such persons are labeled indispensable parties. *Id.*

159. *E.g.*, *Acton Co. v. Bachman Foods, Inc.*, 668 F.2d 76, 79-80 (1st Cir. 1982); *Travelers Indem. Co. v. Dingwell*, 691 F. Supp. 503, 507 (D. Me. 1988); *H & H Int'l Corp. v. J. Pellechia Trucking, Inc.*, 119 F.R.D. 352, 354-55 (S.D.N.Y. 1988); *see also Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108-09 (1968) (although before *Kroger*, the Court likewise held that when the nondiverse absentee would destroy diversity jurisdiction, she cannot be joined).

160. 668 F.2d 76 (1st Cir. 1982).

161. *Id.* at 79-80; *see Mengler, supra* note 8, at 284.

162. Mengler, *supra* note 8, at 284 (citing *Helzberg's Diamond Shops v. Valley West Des Moines Shopping Center*, 564 F.2d 816 (8th Cir. 1977)).

163. *Id.*

164. FED. R. CIV. P. 19(b). Federal Rule 19(b) provides four factors for the court to

action, if a court determines that a nondiverse absentee is not an indispensable party, the absentee may not be joined, and the suit will proceed in her absence.¹⁶⁵ If a court classifies an absentee as "indispensable," however, the case must be dismissed.¹⁶⁶ Courts consistently have held that a nondiverse indispensable party cannot be joined and have denied ancillary jurisdiction in diversity actions.¹⁶⁷

In contrast to the compulsory joinder context, in which an original party to an action seeks a nonparty's presence, intervention under Federal Rule 24 permits a nonparty to seek her own joinder.¹⁶⁸ Federal Rule 24 divides intervention into two categories: intervention of right and permissive intervention. Generally, intervention is "of right" when the applicant claims an interest in the subject matter and her absence would impair or impede her ability to protect her interests.¹⁶⁹ In contrast, intervention is "permissive" when "an applicant's claim or defense and the main action have a question of law or fact in common."¹⁷⁰

Under Federal Rule 24 an extra-jurisdictional question arises similar to that found in the compulsory joinder context: Can a federal court exercise ancillary jurisdiction over an intervenor, whose presence would defeat federal jurisdiction if joined? As in the compulsory joinder context, this problem usually arises in diversity cases when the intervenor is nondiverse as to an adverse party.¹⁷¹

Generally, federal courts have ancillary jurisdiction over an intervenor of right.¹⁷² Ancillary jurisdiction in this context may be jus-

consider:

[F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FED. R. CIV. P. 19(b).

165. See FED. R. CIV. P. 19(b).

166. See *id.*

167. *E.g.*, *Chance v. County Bd. of School Trustees*, 332 F.2d 971, 973 (7th Cir. 1964); *Spiller v. Tennessee Trailers, Inc.*, 97 F.R.D. 347, 348 (N.D. Ga. 1982); see 7 *FEDERAL PRACTICE AND PROCEDURE: CIVIL*, *supra* note 59, § 1610, at 149; Note, *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 993-94 (1958).

168. FED. R. CIV. P. 24. Federal Rule 24 is discussed at length in 7C *FEDERAL PRACTICE AND PROCEDURE: CIVIL*, *supra* note 58, §§ 1901-1923.

169. FED. R. CIV. P. 24(a).

170. FED. R. CIV. P. 24(b).

171. There have been some cases, however, in which the person seeking to intervene as a plaintiff in a federal question case asserts a nonfederal claim. *E.g.*, *Toles v. United States*, 371 F.2d 784, 785 (10th Cir. 1967).

172. *E.g.*, *Phelps v. Oaks*, 117 U.S. 236, 240-46 (1886); *Curtis v. Sears, Roebuck & Co.*, 754 F.2d 781, 783 (8th Cir. 1985); *American Nat'l Bank & Trust Co. v. Bailey*, 750 F.2d 577,

tified on two grounds. Typically the interest of the intervenor of right could be impaired by her absence because it is not adequately represented by the existing parties.¹⁷³ Thus, by allowing intervention the court serves judicial economy by having the entire controversy resolved in one lawsuit rather than several. Also intervention of right promotes fairness for the otherwise absent party:

To require the absentee to stand by and watch others who do not adequately represent him litigate a matter that may result in a disposition that will harm his interest is unfair. This unfairness ought not and need not result from the accident that he is of the wrong citizenship to have independent jurisdictional grounds and the hap- penstance that the original parties chose a federal court rather than a state court as the forum for their dispute.¹⁷⁴

The Supreme Court in *Kroger* acknowledged the validity of ancillary jurisdiction over intervenors of right.¹⁷⁵ In this context, a party who intervenes as of right, whether as a third-party plaintiff or as a third-party defendant, is in a defensive posture—she had no “choice” of forum and thus had to intervene.¹⁷⁶ Many lower federal courts, however, have held that ancillary jurisdiction is improper if the party seeking to intervene as a matter of right could be classified as an indispensable party under Federal Rule 19.¹⁷⁷ If the intervenor was in-

582 (7th Cir. 1984); *Smith Petroleum Serv., Inc. v. Monsanto Chem. Co.*, 420 F.2d 1103, 1113-15 (5th Cir. 1970); *Formulabs, Inc. v. Hatley Pen Co.*, 318 F.2d 485, 491-92 (9th Cir. 1963). See generally 7C FEDERAL PRACTICE AND PROCEDURE: CIVIL, *supra* note 59, §§ 1906-09, 1917 (discussing ancillary jurisdiction in the context of intervention).

In contrast, the federal courts have not exercised ancillary jurisdiction in cases of “permissive intervention” under Rule 24(b). *E.g.*, *Hougen v. Merkel*, 47 F.R.D. 528, 528 (D. Minn. 1969); see also Fraser, *Ancillary Jurisdiction of Federal Courts of Persons Whose Interest May Be Impaired If Not Joined*, 62 F.R.D. 483, 483 (1974) [hereinafter Fraser, *Ancillary Jurisdiction of Federal Courts*] (stating that the same test applies to determine when a person can intervene of right and when ancillary jurisdiction exists). It should be noted that the “common questions of law or fact” requirement of Federal Rule 24(b) may mean that the intervenor’s claim arises out of the same transaction or occurrence as the claims between the existing parties. See J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 2.14, at 78 (1985); Mengler, *supra* note 8, at 282-83. Nevertheless, federal courts have refused ancillary jurisdiction in this context on the basis that it would “conceivably obliterate the complete diversity requirement.” Mengler, *supra* note 8, at 283.

173. 7C FEDERAL PRACTICE AND PROCEDURE: CIVIL, *supra* note 59, § 1917, at 477.

174. *Id.*; see also *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 617 n.14 (1966) (noting that the “same considerations of judicial economy and fairness to all the parties lie behind the doctrine of ancillary jurisdiction . . . and the doctrine that an intervenor of right may assert a cross-claim without independent jurisdictional grounds”) (citations omitted).

175. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 375-76 & n.18 (1978).

176. See *id.* at 375-76 & n.18; see also *Usery v. Brandel*, 87 F.R.D., 670, 680 (W.D. Mich. 1980) (noting that applicants for intervention did not choose the forum and thus cannot circumvent jurisdictional requirements). However, the *Kroger* rationale could be read to prohibit the exercise of ancillary jurisdiction over an intervening third-party plaintiff. Arguably an intervening third-party plaintiff is in an *offensive* position as well as *voluntarily* in the action.

177. *E.g.*, *Traveler’s Indem. Co. v. Dingwell*, 691 F. Supp. 503, 504 (D. Me. 1988);

dispensable but her presence would have destroyed diversity jurisdiction, these courts have held that the intervention must be denied, and the entire action dismissed.¹⁷⁸ If, however, the intervenor of right was only a party who should be joined if feasible under Federal Rule 19, then ancillary jurisdiction could be invoked and intervention granted.¹⁷⁹

This situation has created an anomaly.¹⁸⁰ Under Federal Rule 19, if a nonparty is necessary but not indispensable, and her presence would destroy the court's diversity jurisdiction, joinder is denied and the suit proceeds in her absence.¹⁸¹ She could seek successfully, however, to intervene under the federal court's ancillary jurisdiction.¹⁸² On the other hand, if the same person seeks to intervene but her interest in the action is so significant that the court could not proceed without her, then, paradoxically, the court must deny her application to enter the action, and dismiss the entire case.¹⁸³

Two justifications support the existence of this anomaly. First, when an absentee is deemed "indispensable" under Rule 19, the claim is no longer "ancillary," but an *essential* part of the suit.¹⁸⁴ Thus,

Insurance Co. of N. Am. v. Blindauers Sheet Metal & Heating Co., 61 F.R.D. 323, 323 (E.D. Wis. 1973); see also Fraser, *Ancillary Jurisdiction of Federal Courts*, *supra* note 172, at 484.

178. E.g., *Traveler's Indem. Co.*, 691 F. Supp. at 504; *Insurance Co. of N. Am.*, 61 F.R.D. at 323.

179. E.g., *Drillers Engine & Supply, Inc. v. Burckhalter*, 327 F. Supp. 648, 648 (W.D. Okl. 1971); see also Fraser, *Ancillary Jurisdiction of Federal Courts*, *supra* note 172, at 484.

180. See 7 FEDERAL PRACTICE AND PROCEDURE: CIVIL, *supra* note 59, § 1610, at 149-54; 7C FEDERAL PRACTICE AND PROCEDURE: CIVIL, *supra* note 59, § 1917, at 477-81; see also Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 Ky. L.J. 329, 362-63 (1969) (observing that "the jurisdictional result turns on whether the entry is initiated by one of the original parties under Rule 19, or by the absent party under Rule 24" and that "[t]his distinction seems difficult to rationalize").

181. FED. R. CIV. P. 19(a).

182. See, e.g., *Drumright v. Texas Sugarland Co.*, 16 F.2d 657, 658 (5th Cir.), *cert. denied*, 274 U.S. 749 (1927). There the Fifth Circuit held that a party could not be joined because he was not indispensable but could intervene as a matter of right. *Id.* at 658. The vendor of land and the mortgagor joined in an action against the vendee who had failed to pay the full purchase price. The mortgagor was a citizen of the same state as the defendant and thus was dismissed as a party. The mortgagor was allowed to intervene and assert the same claim he had not been allowed to assert as an original plaintiff because he was a nondiverse party. *Id.* at 658. See also *Glen Falls Ins. Co. v. Cook Bros.*, 23 F.R.D. 269, 272-73 (S.D. Ind. 1959) (noting that "there is a marked difference in the approach followed in a case where voluntary joinder under Rule 24 is sought and a case in which involuntary joinder is sought pursuant to Rule 19").

183. See *supra* notes 177-178 and accompanying text.

184. See *Wichita R.R. & Light Co. v. Public Util. Comm'n*, 260 U.S. 48, 54 (1922). In deciding whether to allow the intervention of a nondiverse party defendant, Chief Justice Taft stated that jurisdiction is not "defeated by the intervention, by leave of the court, of a party whose presence is *not essential* to a decision of the controversy between the original parties." *Id.* (emphasis added).

exercising ancillary jurisdiction would be improper. Second, allowing ancillary jurisdiction in this context constitutes a total circumvention of the complete diversity requirement.¹⁸⁵

Courts and commentators sharply criticize this anomaly, suggesting various approaches to avoid it. One group of commentators has argued that ancillary jurisdiction should extend to indispensable parties, and that the federal court should deny intervention if it finds collusion among the parties to circumvent the federal jurisdiction requirements.¹⁸⁶ Another commentator has contended:

Instead of depending on who initiates the joinder proceeding, jurisdiction should depend on the absentee's relationship to the action and the interest that would be protected by his joinder. Thus, where an absentee has an interest in the subject of an action that may be impaired in his absence, ancillary jurisdiction should exist whether the absentee seeks to intervene or whether he is brought into the action.¹⁸⁷

Similarly, some lower federal courts have reasoned that the only difference between intervention of right and joinder is who initiates the addition of the new party.¹⁸⁸ Thus, the key factor in determining when to exercise ancillary jurisdiction should not be whether the absentee intervenes or joins but whether she is a necessary or indispensable party.¹⁸⁹ In contrast, rather than using labels of "indispensable" or "necessary," the Supreme Court, over a century ago, emphasized the need to protect an intervening party's interest.¹⁹⁰ Regardless of this criticism, however, the anomaly persists.

D. The Beginning of Doctrinal Unification

After *Aldinger v. Howard*,¹⁹¹ the question remained as to whether the statutory inquiry required for pendent-party jurisdiction also ap-

185. See *Chance v. County Bd. of School Trustees*, 332 F.2d 971, 974 (7th Cir. 1964); see also *supra* notes 134-137 and accompanying text. But see 7 FEDERAL PRACTICE AND PROCEDURE: CIVIL, *supra* note 59, § 1610, at 150-151 (arguing that the circumvention of complete diversity does not constitute a serious threat).

186. See 7 FEDERAL PRACTICE AND PROCEDURE: CIVIL, *supra* note 59, § 1610 at 151.

187. Fraser, *Ancillary Jurisdiction of Federal Courts*, *supra* note 172, at 487; see also Kennedy, *supra* note 180, at 363.

188. See, e.g., *New York State Ass'n for Retarded Children v. Carey*, 438 F. Supp. 440, 445 (E.D.N.Y. 1977).

189. *Id.*

190. *Phelps v. Oaks*, 117 U.S. 236, 239 (1886) (allowing persons to intervene as defendants to protect their property interests even though they were nondiverse as to the plaintiff). The Supreme Court noted that "if the Zeidlers were permitted to [intervene and] defend, it was for their own interest, and not because they were either necessary or indispensable parties to the proceeding in which plaintiffs were the actors." *Id.*

191. 427 U.S. 1 (1976).

plied to pendent-claim and ancillary jurisdiction.¹⁹² In *Owen Equipment & Erection Co. v. Kroger*,¹⁹³ the Supreme Court answered this question in the affirmative.

In *Kroger*, the Court brought pendent and ancillary jurisdiction under one analytical framework. Although the Court again found it unnecessary to determine whether any principled differences existed between pendent and ancillary jurisdiction,¹⁹⁴ the Court admitted that the concepts addressed the same issue: When may a federal district court hear and decide a nonfederal claim?¹⁹⁵ The Court began by asserting that the analysis under *United Mine Workers v. Gibbs*¹⁹⁶ "delineate[s] the constitutional limits of federal judicial power."¹⁹⁷ The Court further announced that the *Aldinger* statutory inquiry applied to *all* exercises of pendent-claim and ancillary jurisdiction, as well as pendent-party jurisdiction:

Even if it be assumed that the District Court in the present case had constitutional power to decide the respondent's lawsuit against the petitioner, it does not follow that the decision of the Court of Appeals [to exercise ancillary jurisdiction] was correct. Constitutional power is merely the first hurdle that must be overcome in determining that a federal court has jurisdiction over a particular controversy. For the jurisdiction of the federal courts is limited not only by the provisions of Art. III of the Constitution, but also by Acts of Congress.¹⁹⁸

Although the *Kroger* holding must be read in light of its procedural context—the federal courts' power to exercise ancillary jurisdiction over additional parties—subsequent cases have interpreted *Kroger* as applying the *Aldinger* statutory inquiry to both ancillary¹⁹⁹ and pendent²⁰⁰ jurisdiction over additional nonfederal claims between the *original* parties. Thus, in *all* cases in which a federal court could exercise extra-jurisdictional power, the court had to determine first,

192. See *supra* notes 87-91 and accompanying text.

193. 437 U.S. 365 (1978).

194. *Id.* at 370 n.8.

195. *Id.* at 370.

196. 383 U.S. 715 (1966). See *supra* notes 52-58 and accompanying text.

197. *Kroger*, 437 U.S. at 371. The Court, however, qualified this broad statement, noting, "The Court of Appeals . . . believed that the 'common nucleus of operative fact' test . . . determines the outer boundaries of constitutionally permissible federal jurisdiction when that jurisdiction is based upon diversity of citizenship. We may assume without deciding that the Court of Appeals was correct in this regard." *Id.* at 371 n.10.

198. *Id.* at 371-72 (footnote omitted).

199. See, e.g., *Finkle v. Gulf & Western Mfg. Co.*, 744 F.2d 1015, 1018-19 (3d Cir. 1984); *Travelers Ins. Co. v. First Nat'l Bank*, 675 F.2d 633, 638-40 (5th Cir. 1982).

200. See, e.g., *Jones v. Intermountain Power Project*, 794 F.2d 546, 552 (10th Cir. 1986); *Thompkins v. Stuttgart School Dist. No. 22*, 787 F.2d 439, 441-42 (8th Cir. 1986); *United States ex rel. Hoover v. Franzen*, 669 F.2d 433, 438-41 (7th Cir. 1982).

whether the exercise of jurisdiction was constitutional, and second, whether or not Congress had rejected the exercise of jurisdiction in the relevant jurisdictional statute.

The Court's unified analysis focused on the original federal claim to determine whether the courts had the power to exercise jurisdiction, rather than examining whether the nonfederal claim was pendent or ancillary.²⁰¹ Generally, the issue before the *Kroger* Court was whether a plaintiff could assert a nonfederal claim against a nondiverse third party who otherwise was not otherwise subject to federal jurisdiction.²⁰² In answering this question, the Court distinguished between jurisdiction based on diversity of citizenship and jurisdiction based on a federal question.²⁰³ By applying the *Aldinger* statutory limitation to diversity cases, the *Kroger* Court explicitly prohibited a plaintiff from asserting a nonfederal claim against a nondiverse third party.²⁰⁴ The Court left open this possibility, however, in the context of federal question jurisdiction.

Arguably, a federal court could exercise pendent or ancillary jurisdiction over a plaintiff's nonfederal claim against a nondiverse party in federal question cases without undermining the *Kroger* Court's rationale.²⁰⁵ With the doctrines of pendent and ancillary jurisdiction, litigants may pursue "their federal claims in federal court without being compelled by law in the case of exclusive federal questions, or by practicality in the case of concurrent federal questions to send off the rest of their litigation package to state court or to abandon entirely the state portion of the package."²⁰⁶ In cases falling within the *concurrent* jurisdiction of federal and state courts, a plaintiff could bring the entire action in state court and thus effectuate judicial efficiency.

201. See Note, *Toward a Theory of Incidental Jurisdiction*, *supra* note 21, in which the author relies on the *Kroger* decision to propose a uniform theory of "incidental jurisdiction." In determining whether a court may exercise "incidental jurisdiction," the author does not use the labels of pendent and ancillary jurisdiction, but rather argues that courts should only consider whether the basis for the federal claim is diversity or a federal question. *Id.* at 1941-43, 1946-53.

202. *Kroger*, 437 U.S. at 367. The Court was faced with the same issue in *Aldinger v. Howard*, 427 U.S. 1, 2-3 (1976), but refused to answer the question in broad terms. See *supra* notes 89-91 and accompanying text.

203. It should be noted that the issue of pendent-claim jurisdiction does not arise in the context of diversity cases, since a plaintiff may always aggregate claims against the same diverse defendant as long as at least one claim satisfies the jurisdictional amount in controversy requirement. See, e.g., *Ayala v. United States*, 550 F.2d 1196, 1198 n.2 (9th Cir.), *cert. granted*, 434 U.S. 814 (1977), *cert. dismissed*, 435 U.S. 982 (1978).

204. See 13 FEDERAL PRACTICE AND PROCEDURE: JURISDICTION, *supra* note 8, § 3523, at 101; Note, *Toward a Theory of Incidental Jurisdiction*, *supra* note 21, at 1940.

205. See Note, *Toward a Theory of Incidental Jurisdiction*, *supra* note 21, at 1941-43.

206. Mengler, *supra* note 8, at 280.

In passing the federal statutes, however, Congress intended to ensure the availability of federal forums for the vindication of federally created rights.²⁰⁷ Requiring plaintiffs to bring their federal question claims in state court would frustrate this congressional intent. Furthermore, there is no guarantee that a plaintiff will choose to bring her *entire* action in a state court. Instead, she may split her claims between state and federal court and litigate the same set of facts in two forums. This litigation strategy wastes judicial time and energy. Federal courts have a duty to promote judicial economy of the *total* court system and prevent crowded dockets not only in federal courts, but also in state courts.²⁰⁸ As one commentator noted, "If federal courts refuse to use conceptual tools to dispose of all related claims with the greatest economy and convenience, the federal courts then add to the total ineconomy and inconvenience which litigants must suffer to obtain justice on the merits of their claims."²⁰⁹

In cases arising under *exclusive* federal jurisdiction, the court's denial of pendent or ancillary jurisdiction over a plaintiff's nonfederal claim would not only contribute to the system's inefficiency, it also would be unfair. Because a federal court is the only forum in which all the claims may be tried together, the plaintiff would not have the option of taking the main claim to state court.²¹⁰ In such a case, the plaintiff does not have a real choice of forum. Thus, both plaintiff and defendant may be viewed as in a defensive posture—neither party having a real choice of forum.²¹¹ Under the *Kroger* analysis, therefore, "plaintiff-defendant labels do not conclusively determine posture."²¹² In this way, *Kroger's* rationale could be read consistently with the exercise of pendent-party jurisdiction in cases based on exclusive federal jurisdiction.²¹³ The *Aldinger* Court had left this possibility open.²¹⁴ Arguably, this situation presents the strongest case for retaining a related nonfederal claim against a nondiverse third party.

Even though the Supreme Court's *Aldinger* and *Kroger* decisions unified the analysis of pendent and ancillary jurisdiction, most lower federal courts adhered to the pendent-ancillary distinction.²¹⁵ Many

207. See *infra* note 260 and accompanying text.

208. See Comment, *Toward a Synthesis of Two Doctrines*, *supra* note 42, at 1268 n.29 (quoting 3 J. MOORE, *FEDERAL PRACTICE*, para. 14.27, at 14-572 (2d ed. 1948)).

209. *Id.*

210. See *Aldinger v. Howard*, 427 U.S. 1, 18 (1976).

211. See Note, *Toward a Theory of Incidental Jurisdiction*, *supra* note 21, at 1945.

212. *Id.* at 1944.

213. See *supra* notes 142-145 and accompanying text.

214. *Aldinger*, 427 U.S. at 18; see *supra* note 88 and accompanying text.

215. Note, *Developing a Unified Approach*, *supra* note 5, at 532.

courts and commentators comparing pendent and ancillary jurisdiction concluded that they are distinguishable. The distinctions made, however, vary. The Fifth Circuit, for example, has held that nonfederal claims were not within the federal court's ancillary jurisdiction because they were not "logically dependent" on the main claim, even though they arose from a "common nucleus of operative fact."²¹⁶ Such an analysis places greater limitations on the federal courts' ancillary powers than its pendent powers. On the other hand, Professor Miller has argued that imposing the *Gibbs* common nucleus test on ancillary jurisdiction would create "practical difficulties of administration" because not all claims arising from the same transaction or occurrence arise out of a common nucleus of operative fact.²¹⁷ Professor Miller views ancillary jurisdiction as broader than pendent jurisdiction.

Some courts and commentators have treated the "same transaction or occurrence" test and the "common nucleus of operative facts" test as interchangeable.²¹⁸ Although arguably the most appropriate interpretation of the two standards,²¹⁹ this view has not gained widespread acceptance. Thus, the federal courts have persisted in their inconsistent and haphazard application of pendent and ancillary jurisdiction.

II. The Extinction of Supplemental Jurisdiction

Although pendent and ancillary jurisdiction have been marked with confusion and inconsistency, the federal circuits generally have accepted these doctrines as necessary for the efficient and just adjudication of claims in federal court.²²⁰ In *Finley v. United States*,²²¹

216. *Travelers Ins. Co. v. First Nat'l Bank*, 675 F.2d 633, 638-40 (5th Cir. 1982) (interpreting *Kroger* as demanding logical dependence between the federal and nonfederal claims in addition to the same "core of operative facts"); see also Note, *Toward a Theory of Incidental Jurisdiction*, *supra* note 21, at 1950-51 (discussing generally, "common nucleus of operative facts" and logical dependence test); *supra* notes 114-118 and accompanying text.

217. Miller, *supra* note 8, at 6-7. See also *Wilder v. Irvin*, 423 F. Supp. 639, 643 (N.D., Ga. 1976) (admitting that the claims arose from the same transaction or occurrence but declining to hear the pendent claim because of insufficient evidentiary overlap between the state and federal claim); see also *Jacobs v. United States*, 367 F. Supp. 1275, 1277 (D. Ariz. 1973) (characterizing pendent jurisdiction as a subset of ancillary jurisdiction).

218. See, e.g., *Bernstein v. Crazy Eddie, Inc.* 702 F. Supp. 962, 983 (E.D.N.Y. 1988) (a federal court must determine whether the federal and nonfederal claims arose from a "common nucleus of operative fact" before conferring ancillary jurisdiction); Matasar, *Rediscovering "One Constitutional Case," supra* note 17, at 1453-54; Mengler, *supra* note 8, at 274 n.132; see also *supra* notes 62-63 and accompanying text (cases adopting a "transactional" interpretation of the *Gibbs* standard).

219. See *infra* notes 289-291.

220. See Mengler, *supra* note 8, at 247-48; see also *supra* notes 6-9, 32-37, 205-214 and accompanying text.

221. 490 U.S. 545 (1989).

however, the Supreme Court abruptly extinguished the era of pendent and ancillary jurisdiction.²²²

A. The *Finley* Holding

In *Finley*, the plaintiff's husband and children were killed when their airplane struck electrical wires during its approach to a San Diego airport. Ms. Finley sued the utility company in state court, and later brought an action against the United States under the Federal Tort Claims Act (FTCA)²²³ for the negligence of the Federal Aviation Administration. Because FTCA actions arise under exclusive federal jurisdiction, Ms. Finley brought the action against the United States in federal court. She later sought to append the state claim against the utility company.²²⁴ The issue confronting the Court was whether a federal court could extend jurisdiction over a nonfederal claim against a nondiverse third party, simply because the court had *exclusive* jurisdiction over a federal claim arising from the same set of facts.²²⁵

In light of the *Aldinger-Kroger* precedents, *Finley* presented a strong case for the extension of pendent-party jurisdiction. The original claim was within the exclusive jurisdiction of the federal courts. Not only had *Aldinger* specifically mentioned exclusive jurisdiction as a category of cases when pendent-party jurisdiction might be appropriate,²²⁶ but jurisdiction also seemed consistent with the *Kroger* Court's rationale.²²⁷ Moreover, in contrast to the diversity jurisdiction statute, the FTCA did not appear to have policies inconsistent with the exercise of pendent-party jurisdiction.²²⁸ Nevertheless, Justice Scalia, writing for the majority in *Finley*, dismissed these arguments.²²⁹

The *Finley* Court applied the *Gibbs-Aldinger-Kroger* analytical framework.²³⁰ The Court first assumed that *Gibbs* delineated the broadest constitutional authority to exercise pendent-party jurisdiction and that Ms. Finley's nonfederal claims met the minimum constitu-

222. See Mengler, *supra* note 8, at 247; Perdue, *supra* note 12, at 539-41; Comment, *Pendent Party Jurisdiction After Finley v. United States: A Trend Toward Its Abolition*, 24 GA. L. REV. 447, 465 (1990) (authored by Susan Irby Lasseter) [hereinafter Comment, *Pendent Party Jurisdiction After Finley*].

223. The Federal Tort Claims Act is codified at 28 U.S.C. 1346(b) (1988).

224. *Finley*, 490 U.S. at 546.

225. *Id.* at 547.

226. *Aldinger v. Howard*, 427 U.S. 1, 18 (1976). See *supra* note 90 and accompanying text.

227. See *supra* notes 210-213 and accompanying text.

228. See Perdue, *supra* note 12, at 551-52.

229. *Finley*, 490 U.S. at 555-56.

230. *Id.* at 548-52.

tional criterion.²³¹ Next, the Court examined whether Congress had addressed the exercise of pendent-party jurisdiction in this context.²³² Under *Aldinger* a federal court was empowered to exercise pendent-party jurisdiction *unless* Congress had acted to *deny* it.²³³ The *Finley* Court, however, rejected this approach. Instead, the Court announced that federal courts had to find an *express* congressional *authorization* to exercise jurisdiction over nonfederal claims.²³⁴ As a result of the new stringent requirement of express congressional approval, the Court held that the FTCA provision conferring jurisdiction over civil actions against the United States did not authorize jurisdiction over claims against pendent parties for which there was no independent source of jurisdiction.²³⁵

Furthermore, the *Finley* Court explicitly closed the opening left by *Aldinger*. In *Finley*, the Court held that *exclusive* federal jurisdiction over the original claim was insufficient to justify the exercise of pendent-party jurisdiction.²³⁶ It acknowledged the negative impact of the decision, but claimed it had no choice:

Because the FTCA permits the Government to be sued only in federal court, our holding that parties to related claims cannot necessarily be sued there means that the efficiency and convenience of a con-

231. *Id.* at 548-49.

232. As in *Kroger*, the Court affirmed that federal courts do not automatically possess the authority to hear all actions covered by the Constitution. The provisions of Article III specify the outer limits of federal subject matter jurisdiction. Within those limits the federal courts are authorized to hear only those cases that Congress authorizes them to hear. *Finley*, 490 U.S. at 548. See *supra* text accompanying notes 131-133 and 198.

233. See *supra* notes 86-88 and accompanying text.

234. *Finley*, 490 U.S. at 549-51. See Mengler, *supra* note 8, at 255-56; Perdue, *supra* note 12, at 555 ("the Court chose not to dignify the ['negation'] test with so much as a decent burial"). The Court based its decision on the well accepted principle that both constitutional and congressional authorization are necessary to create federal subject matter jurisdiction. *Finley*, 490 U.S. at 548 (citing *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1867)); see also *supra* notes 29-30 and accompanying text. The Court extended this idea to require *express* congressional authorization before a federal court may exercise pendent-party jurisdiction.

Justice Blackmun in his dissent argued that the majority considered the wrong question under *Aldinger*, and that the proper inquiry was whether "Congress has demonstrated an intent to exempt 'the party as to whom jurisdiction pendent to the principal claim' is asserted from being haled into federal court." *Finley*, 490 U.S. at 556 (Blackmun, J., dissenting) (quoting *Aldinger*, 427 U.S. at 16) (emphasis in original); see also *id.* at 573-75 (Stevens, J., dissenting) (arguing that the majority opinion is inconsistent with *Aldinger*).

235. *Finley*, 490 U.S. at 551-52 (holding the phrase "'against the United States' means against the United States and no one else"); see also Mengler, *supra* note 8, at 257-58.

236. *Finley*, 490 U.S. at 551-52. However, Justice Blackmun in his dissent argued that *Aldinger* should not be interpreted as an obstacle to the exercise of pendent-party jurisdiction since *Aldinger's* dicta stated that pendent-party jurisdiction might be proper in this precise circumstance. *Id.* at 557-58 (Blackmun, J., dissenting). According to Justice Blackmun, the sensible result in a case with an exclusive federal claim is to extend jurisdiction over the pendent-party. *Id.*; see also *id.* at 569-70 (Stevens, J., dissenting).

solidated action will sometimes have to be foregone in favor of separate actions in state and federal courts. We acknowledged this potential consideration in *Aldinger*, 427 U.S., at 18, but now conclude that the present statute permits no other result.²³⁷

Thus, Ms. Finley had to bring her state claim in state court, which forced her to bring separate lawsuits against each defendant.

B. The Far-Reaching Implications of *Finley*

If *Finley*'s only consequence was to extinguish the federal courts' power to exercise pendent-party jurisdiction under the FTCA, its holding would justify less discussion. The implications of the decision, however, were far-reaching. One commentator described the consequences as follows: "In *Finley*, the Supreme Court turned [the *Gibbs-Aldinger-Kroger*] analytical framework on its head and in the process took the breath away from all forms of supplemental jurisdiction."²³⁸

(1) *The Abolition of Pendent-Party Jurisdiction*

Although the Court's holding only explicitly abolished pendent-party jurisdiction under the FTCA, Justice Scalia's opinion was written broadly enough to threaten the entire doctrine's viability.²³⁹ All instances of pendent-party jurisdiction involve a party over whom Congress has not explicitly authorized federal jurisdiction, otherwise, the doctrine of pendent-party jurisdiction would be unnecessary.²⁴⁰ Thus, *Finley* has caused much confusion in this area.²⁴¹ In fact, many

237. *Id.* at 555-56.

238. Mengler, *supra* note 8, at 255.

239. *See id.* at 258; Perdue, *supra* note 12, at 540; Comment, *Pendent Party Jurisdiction After Finley*, *supra* note 222, at 470.

240. Justice Blackmun, in his dissenting opinion, recognized this consequence of *Finley*:

[T]he *Aldinger* test would be rendered meaningless if the required intent could be found in the failure of the relevant jurisdiction statute to mention the type of party in question, "because all instances of asserted pendent-party jurisdiction will by definition involve a party as to whom Congress has impliedly 'addressed itself' by not expressly conferring subject-matter jurisdiction on the federal courts."

Finley, 490 U.S. at 556-57 (Blackmun, J., dissenting) (quoting *Aldinger v. Howard*, 427 U.S. 1, 23 (1976) (Brennan, J., dissenting)).

241. *See* Perdue, *supra* note 12, at 570-72. Some lower federal courts admit that *Finley* does affect the future of pendent-party jurisdiction, but believe that the Court did not intend to abolish this useful doctrine. Thus, they struggle to limit *Finley* to its facts. *See, e.g.,* *Roco Carriers, Ltd. v. M/V Nurnberg Express*, 899 F.2d 1292, 1295-97 (2d Cir. 1990) (distinguishing *Finley* and the jurisdictional statute for FTCA claims from the admiralty jurisdiction statute, and holding that "pendent-party jurisdiction is [still] available in the unique area of admiralty"); *Bruce v. Martin*, 724 F. Supp. 124, 130 (S.D.N.Y. 1989) (noting that the *Finley* approach may be intended to apply only to statutes, such as the FTCA, which specifically refer to claims

lower federal courts have read the decision as precluding the federal courts' exercise of pendent-party jurisdiction altogether.²⁴²

(2) *The Abolition of Ancillary Jurisdiction Over Additional Parties*

After *Finley*, any exercise of pendent or ancillary jurisdiction over claims by or against additional parties appeared to be doomed.²⁴³ *Finley* undermined the exercise of pendent and ancillary jurisdiction in the context of impleader, compulsory and permissive joinder, compulsory counterclaims and cross-claims against additional parties, and claims raised by intervenors of right: "Our cases show . . . that with respect to the *addition of parties*, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdiction statutes broadly."²⁴⁴ In the final substantive paragraph of the majority opin-

against "particular parties"). Other courts, however, have continued to analyze pendent-party jurisdiction as if *Finley* changed nothing. See, e.g., *Rodriguez v. Comas*, 888 F.2d 899, 905-06 (1st Cir. 1989), *amending* 875 F.2d 979 (1st Cir. 1989) (allowing joinder of a pendent-party plaintiff in a § 1983 action). *Rodriguez* was initially decided a few days after *Finley* without citation to that case. The court later amended its opinion to include a discussion of *Finley*, but reaffirmed its conclusion that pendent-party jurisdiction was properly extended. *Id.* See also *Armstrong v. Edelson*, 718 F. Supp. 1372, 1376 (N.D. Ill. 1989) (citing *Finley* for the proposition that a federal court's determination to exercise pendent-party jurisdiction requires that the court decide whether "Congress has limited or negated pendent jurisdiction" in the relevant statute—the *Aldinger* statutory inquiry); *640 Broadway Renaissance Co. v. Cuomo*, 714 F. Supp. 686, 690 (S.D.N.Y. 1989) (also citing *Finley* for support of the *Aldinger* statutory inquiry).

The Ninth Circuit has upheld pendent-party jurisdiction in a case removed under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1441(d) (1988). *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1408-09 (9th Cir. 1989). The Ninth Circuit held that the relevant statutory language was distinguishable from that in *Finley* and authorized pendent-party jurisdiction. Unlike the FTCA, the FSIA allows the removal of "any civil action" against a foreign state. The Ninth Circuit noted that this phrase "tends to affirmatively exclude the sort of unspoken qualification read into the statute in *Finley*." 892 F.2d at 1409. See also *Nolan v. Boeing*, 919 F.2d 1058, 1064 (5th Cir. 1990) (stating that the phrase "any civil action" allows removal of the entire FSIA suit). The Ninth Circuit's opinion is especially noteworthy because prior to *Finley*, the Ninth Circuit was the only court to reject pendent-party jurisdiction categorically. See *Carpenters S. Calif. Admin. Corp. v. D & L Camp Constr. Co.*, 738 F.2d 999, 1000 (9th Cir. 1984); see also *Perdue*, *supra* note 12, at 570-71 & n.179.

242. E.g., *Iron Workers Mid-South Pension Fund v. Terotechnology*, 891 F.2d 548, 551 (5th Cir. 1990) (describing *Finley* as holding that pendent-party jurisdiction, while constitutional, has not been congressionally authorized); *Staffer v. Bouchard Trans. Co.*, 878 F.2d 638, 643 n.5 (2d Cir. 1989) (observing that "pendent-party jurisdiction apparently is no longer a viable concept" after *Finley*); *Mechanical Rubber & Supply Co. v. American Saw & Mfg. Co.*, 747 F. Supp. 1292, 1298 (C.D. Ill. 1990) (noting that, "[t]here may be statutes that affirmatively grant pendent-party jurisdiction, but they surely must be exceptional. It is not surprising that lower courts are reading *Finley* as putting an end to that jurisdiction." (citations omitted)).

243. See *Finley*, 490 U.S. at 574-75 & n.30 (Stevens, J., dissenting); *Mengler*, *supra* note 8, at 258-59; *Perdue*, *supra* note 12, at 557-66.

244. *Finley*, 490 U.S. at 549 (emphasis added).

ion, Justice Scalia concluded that "[a]ll our cases . . . have held that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims *by or against* different parties."²⁴⁵

The Court's broad language foreclosed the extra-jurisdictional possibilities left open after *Aldinger* and *Kroger*.²⁴⁶ It implicitly rejected the view expressed in *Kroger* that the posture of the party attempting the joinder of an additional party might be determinative.²⁴⁷ Although out of fairness a court may extend ancillary jurisdiction to parties that a *defendant* seeks to join, the *Finley* Court concluded that "neither the convenience of the litigants nor consideration of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction."²⁴⁸ Indeed, at least one district court acknowledged that *Finley* threatened ancillary jurisdiction over the impleader of a non-diverse third-party defendant.²⁴⁹

(3) *Does Finley Undermine Gibbs and the Exercise of Pendent-Claim and Ancillary-Claim Jurisdiction?*

Although the language in *Finley* indicates that the Court wished to leave the *Gibbs*-line of cases untouched, this desire was contradicted by the Court's rationale. Justice Scalia noted that "our cases do not display an entirely consistent approach with respect to the necessity that jurisdiction be explicitly conferred. The *Gibbs* line of cases was a departure from prior practice, and a *departure that we have no intent to limit or impair*."²⁵⁰ To make a distinction between the exercise of supplemental jurisdiction over an additional party and supplemental

245. *Id.* at 556 (emphasis added).

246. *Id.*; see *supra* notes 90, 142-153, 205-214 and accompanying text.

247. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 375-76 (1978). In *Kroger*, the Court clearly left open the possibility that the defendant, rather than the plaintiff, might join an additional party based on ancillary jurisdiction. *Id.*

248. *Finley*, 490 U.S. at 522 (quoting *Kroger*, 437 U.S. at 376-77).

249. *Community Coffee Co. v. M/S Kriti Amethyst*, 715 F. Supp. 772, 773-74 (E.D. La. 1989). This court seemed reluctant to reach such a conclusion because of the "compelling policy considerations" in support of ancillary jurisdiction. After analyzing *Finley*, however, the court concluded:

[T]he ancillary jurisdictional basis for the third party claims . . . may have been caught in the wide swath *Finley* cut into supplemental jurisdiction. While the *Finley* majority may well have intended to address specifically the pendent party jurisdiction problem, the opinion's sweeping language is undeniable. Thus, its effect on supplemental jurisdiction in general is potentially far-reaching.

Id. at 774 (footnotes omitted); see also *Aetna Casualty & Sur. Co. v. Spartan Mechanical Corp.*, 738 F. Supp. 664, 673-77 (E.D.N.Y. 1990) (reviewing conflicting district court decisions).

250. *Finley*, 490 U.S. at 556 (emphasis added).

jurisdiction over an existing party, however, makes little sense under the Court's analysis.²⁵¹ Both doctrines involve the adjudication of a nonfederal claim that is beyond the limits of federal subject-matter jurisdiction. As one commentator has argued, "because they exceed our state-federal balance in the same measure, both should rise or fall together."²⁵²

Both courts and commentators have advocated this view. Even prior to *Finley*, many commentators contended that jurisdiction over pendent parties is neither more or less troubling than other recognized forms of supplemental jurisdiction.²⁵³ Recently, Judge Posner, writing for a unanimous Seventh Circuit, noted that the court was

well aware that [the *Finley*] decision is premised on a hostility to nonstatutory jurisdiction that may eventually sweep into history's dustbin not only whatever pendent party jurisdiction survives the holding of *Finley* but also pendent claim jurisdiction and ancillary jurisdiction. And we share the concern that underlies *Finley* with judges' creating their own jurisdiction.²⁵⁴

Thus, as one commentator has stated, "the *Finley* Court declared *Gibbs* brain dead, but refused to discontinue life support. One can only wonder how long this can continue."²⁵⁵

C. The Practical Consequences of *Finley*

The consequences of the complete extinction of supplemental jurisdiction would be devastating. In cases in which the plaintiff had an exclusive federal claim and a closely related nonfederal claim, the abolition of pendent jurisdiction would leave the plaintiff without a forum in which to bring both claims. The plaintiff in this circumstance would have two options: She could split her lawsuit between federal

251. See Mengler, *supra* note 8, at 259-60; Perdue, *supra* note 12, at 566-70; see also *Finley*, 490 U.S. at 572 (Stevens, J., dissenting) (criticizing the majority on the grounds that "[i]f the Court's demonstration were controlling, *Gibbs* [and the Court's other supplemental jurisdiction cases] were incorrectly decided").

252. Mengler, *supra* note 8, at 260.

253. See, e.g., Freer, *supra* note 17, at 66-67; Matasar, *A Pendent and Ancillary Jurisdiction Primer*, *supra* note 17, at 167-69; Note, *Toward a Theory of Incidental Jurisdiction*, *supra* note 21.

254. Harbor Ins. Co. v. Continental Corp., 922 F.2d 357, 361-62 (7th Cir. 1990). The court ultimately held that until the Supreme Court actually discarded ancillary jurisdiction, "we are bound by it and its logic, which embraces a Rule 13(e) counterclaim that arises out of the same transaction or occurrence as the complaint." *Id.* But see *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1408 (9th Cir. 1989), in which the Ninth Circuit in dicta cited *Finley* for the proposition that "[i]n the case of pendent claim jurisdiction, the Supreme Court has extended jurisdiction to the full extent authorized by *Gibbs* without conducting a close examination of the relevant jurisdictional statutes."

255. Perdue, *supra* note 12, at 568.

and state courts, or she could sue in only one forum and forsake either the federal or state claim.

Neither option is desirable. First, to force a litigant to split her case between the state and federal courts is both judicially inefficient and inconvenient for the parties.²⁵⁶ This option is complicated further by the principles of claim and issue preclusion; the issues resolved in the first claim to reach final judgment might bind the parties in the parallel litigation of the other claim.²⁵⁷ The second alternative would require the plaintiff to forego one of her claims and litigate the other in either federal or state court. If both claims are substantial, this option is clearly unsatisfactory. The alternative "of depriving litigants of the practical means to litigate all of their colorable claims is inconsistent with the goals of any rational procedural system."²⁵⁸

In cases in which the plaintiff has a federal claim with concurrent jurisdiction and a closely related nonfederal claim, the plaintiff would have a third, equally unsatisfactory, option. In order to litigate both claims in one forum, the plaintiff would likely bring the entire action in state court.²⁵⁹ This third option sacrifices the plaintiff's opportunity to have her federal claims adjudicated in a federal court. This undermines the congressional intent in creating federal jurisdiction: to ensure plaintiffs have a meaningful choice between state and federal forums for the adjudication of their federal claims.²⁶⁰

In cases in which the *defendant* has a nonfederal claim closely related to the plaintiff's original claim, the abolition of supplemental

256. Mengler, *supra* note 8, at 269; see also *supra* notes 207-210 and accompanying text; *Musher Found. v. Alba Trading Co.*, 127 F.2d 9, 11 (2d Cir.) (Clark, J., dissenting), *cert. denied*, 317 U.S. 641 (1942), in which Judge Clark observed, "If the roast must be reserved exclusively for the federal bench, it is anomalous to send the gravy across the street to the state court house." *Id.*

257. See Miller, *supra* note 8, at 5-6. For a detailed discussion of the claim and issue preclusive effect of state court findings in federal courts, and vice versa, see 18 *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION*, *supra* note 8, §§ 4468-4472.

258. Mengler, *supra* note 8, at 269.

259. Schenkier, *supra* note 9, at 247-48; Note, *Toward a Theory of Incidental Jurisdiction*, *supra* note 21, at 1936, 1943; see also *Aldinger v. Howard*, 427 U.S. 1, 36 (1976) (Brennan, J., dissenting) (contending that forcing a federal plaintiff to litigate her case in both federal and state courts impairs the ability of federal courts to grant relief and "imparts a fundamental bias against utilization of the federal forum").

260. Schenkier, *supra* note 9, at 248. See also *Aldinger*, 427 U.S. at 36 (Brennan, J., dissenting), in which Justice Brennan argued:

[R]egardless of the monetary expense and other disadvantages of duplicate litigation, regardless of the waste of judicial time and the "travesty on sound judicial administration," the Court by its *per se* rule forces upon a litigant the indefensible choice of either suffering the costs of duplicate litigation or forgoing his right, a right emphatically emphasized in the congressional policy, to a federal forum in which to be heard on his federal claim.

jurisdiction would have slightly different, but equally devastating, consequences. When the defendant seeks to bring a nonfederal claim under the federal court's extra-jurisdictional power, the plaintiff already has chosen the federal court. Thus, access to a federal forum is a non-issue. An additional goal of supplemental jurisdiction, however, is to ensure a convenient and efficient forum for the adjudication of an entire controversy. By providing the defendant with the opportunity to raise closely related counterclaims, cross-claims, and third-party claims, the doctrine of ancillary jurisdiction allows *both* parties to litigate their entire controversy in a federal forum. The doctrine also ensures fairness to the defendant who is haled into court against his will. Ancillary jurisdiction "provides an immediate forum for a party involuntarily before a federal court who otherwise would be forced to bring his related claim in a separate state court proceeding."²⁶¹

The *Finley* Court acknowledged that its holding meant "the [judicial] efficiency and [litigant] convenience of a consolidated action will sometimes have to be foregone in favor of separate actions in state and federal courts."²⁶² The Court, however, believed it had no choice.²⁶³

D. The Supreme Court Invites Congress to Act

The *Finley* Court virtually invited Congress to fill the jurisdictional gaps its decision had created.²⁶⁴ Justice Scalia wrote, "Whatever we say regarding the scope of jurisdiction . . . can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."²⁶⁵ The Court ultimately concluded that deciding the case another way only would lead to confusion.²⁶⁶ After *Finley*, therefore, Congress was left with the opportunity "to write on a clean slate."²⁶⁷

III. Congress Accepts the Supreme Court's Invitation: The Statutory Resurrection of Supplemental Jurisdiction

Seventeen months after *Finley*, Congress accepted the Supreme Court's invitation to codify federal extra-jurisdictional power. Both

261. Note, *Toward a Theory of Incidental Jurisdiction*, *supra* note 21, at 1937; *see also* *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376-77 (1977).

262. *Finley v. United States*, 490 U.S. 545, 555 (1989).

263. *Id.* at 555-56.

264. H.R. REP. NO. 734, 101st Cong., 2d Sess. 28 (1990), *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6860, 6874; Mengler, Burbank & Rowe, *supra* note 14, at 214; *see also* 136 CONG. REC. S17580-81 (daily ed. Oct. 27, 1990) (statement of Sen. Grassley adopting the House analysis).

265. *Finley*, 490 U.S. at 556.

266. *Id.*

267. Mengler, *supra* note 8, at 267.

the House and the Senate believed it was necessary to provide federal courts with the statutory authority to exercise jurisdiction over non-federal claims.²⁶⁸ Each house recognized the practical implications of the *Finley* decision²⁶⁹ and appreciated the benefits accompanying the doctrines of pendent and ancillary jurisdiction. The House Report states that supplemental jurisdiction

has enabled federal courts and litigants to take advantage of the federal procedural rules on claim and party joinder to deal economically—in single rather than multiple litigation—with related matters Moreover, the district courts' exercise of supplemental jurisdiction, by making federal court a practical arena for the resolution of an entire controversy, has effectuated Congress's intent in the jurisdictional statutes to provide plaintiffs with a federal forum for litigating claims within original federal jurisdiction.²⁷⁰

As a result, Congress statutorily resurrected pendent and ancillary jurisdiction in its enactment of section 1367.²⁷¹ Applicable to all civil actions commenced after December 1, 1990,²⁷² section 1367 provides in pertinent part:

(a) In General. — Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article

268. H.R. REP. NO. 734, 101st Cong., 2d Sess. 28, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6860, 6874.

269. *Id.* (recognizing that *Finley* threatened to eliminate previously accepted forms of supplemental jurisdiction).

270. *Id.*

271. 28 U.S.C. § 1367 is part of the Federal Courts Study Committee Implementation Act. 136 CONG. REC. H13301-07 (daily ed. Oct. 27, 1990). The Federal Courts Study Committee was born in the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified at scattered sections of Titles 5, 9, 16, 17, 18, 28, and 42), in which Congress commissioned the Committee to provide a comprehensive plan to address the ever-increasing concerns of federal court congestion and workload. *See* 136 CONG. REC. E2501 (daily ed. July 26, 1990) (statement of Rep. Kastenmeier). Pursuant to the Act, Chief Justice Rehnquist appointed a fifteen-member committee to study the federal courts and recommend reforms. *Id.* The Federal Courts Study Committee completed its report on April 2, 1990. *Id.* Among its recommendations was the codification of pendent and ancillary jurisdiction. FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47-48 (April 2, 1990). Congress accepted this recommendation in its enactment of 28 U.S.C. § 1367.

272. Courts have recognized that cases decided after the statute's enactment but filed before its effective date are governed by *Finley*. *E.g.*, *Chelsey v. Union Carbide Corp.*, 927 F.2d 60, 65-66 n.3 (2d Cir. 1991); *Lewis v. Windsor Door Co.*, 926 F.2d 729, 731 n.3 (8th Cir. 1991); *Ortega v. Schramm*, 922 F.2d 684, 693 n.12 (11th Cir. 1991); *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 361-62 (7th Cir. 1990) (originally decided on Dec. 17, 1990, the opinion was amended on Dec. 20, 1990 to include discussion of section 1367).

III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) Diversity Cases. — In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 or such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.²⁷³

The statute replaced the labels of pendent and ancillary jurisdiction with the unifying principle of “supplemental jurisdiction.”²⁷⁴

A. General Limitations on Supplemental Jurisdictional Power Pursuant to Section 1367(a)

Prior to the enactment of section 1367, the Supreme Court had adopted a uniform analytical framework for determining when a federal court had the *power* to hear a nonfederal claim.²⁷⁵ This involved a two-step inquiry into whether the federal court had constitutional and statutory authorization to exercise pendent or ancillary jurisdiction. In its enactment of section 1367, Congress adopted a modified version of this two-step approach.

(1) *The Constitutional Inquiry*

In its analytical framework, the Supreme Court did not define the extent of the federal courts’ constitutional power to exercise supplemental jurisdiction in all contexts. In *Kroger*, the Court simply assumed that *Gibbs* determined the outer boundaries of constitutionally permissible jurisdiction in all federal cases.²⁷⁶ Similarly, in *Finley*, the Court “assume[d], without deciding, that the constitutional criterion

273. 28 U.S.C.A. § 1367 (West Supp. 1991). The statute further provides that district courts have discretion to decline supplemental jurisdiction in certain circumstances. *Id.* § 1367(c). The remainder of this Note will concentrate on the new boundaries of federal judicial power to exercise supplemental jurisdiction under 28 U.S.C. § 1367(a) and (b). Analysis of the federal courts’ authority to use discretion to decline supplemental jurisdiction under subsection (c), will not be examined.

274. See *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 362 (7th Cir. 1990); *C.D.S. Diversified, Inc. v. Franchise Fin. Corp.*, 757 F. Supp. 202, 205 (E.D.N.Y. 1991); *Federal Deposit Ins. Corp. v. Loube*, 134 F.R.D. 270, 274 n.3 (N.D. Cal. 1991).

275. See *supra* notes 191-204, 230-235 and accompanying text.

276. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 371 n.10 (1978).

for pendent-party jurisdiction is analogous to the constitutional criterion for pendent-claim jurisdiction."²⁷⁷

Congress alleviated much confusion and inconsistency by uniformly limiting supplemental jurisdictional power. Section 1367 only requires that the nonfederal claims be "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."²⁷⁸ Section 1367(a)'s second sentence equally extends the boundaries of supplemental power over claims involving the addition of parties.²⁷⁹ Congress thus intended to codify the scope of supplemental jurisdiction articulated by the Supreme Court in *Gibbs*,²⁸⁰ and to expand its application to all contexts of supplemental jurisdiction.²⁸¹

The question remains as to what is the proper standard to determine the boundaries of federal supplemental power. Because federal courts have defined and applied the constitutional criteria for pendent²⁸² and ancillary²⁸³ jurisdiction inconsistently, it is now imperative to develop a uniform constitutional standard to apply section 1367.

Much of the previous confusion may be attributable to the Supreme Court's language in *Gibbs*.²⁸⁴ Although citing the Federal Rules as a basis for its liberal approach to pendent jurisdiction, the Court adopted a "common nucleus of operative fact" test, rather than the "same transaction or occurrence" language used in the Federal Rules and associated with ancillary jurisdiction.²⁸⁵ Although courts and commentators have attempted to interpret the "common nucleus of operative fact" standard,²⁸⁶ they may have erred by placing too much significance on the Supreme Court's choice of language in the *Gibbs*

277. *Finley v. United States*, 490 U.S. 545, 549 (1989).

278. 28 U.S.C.A. § 1367(a) (West Supp. 1991).

279. This provision modifies current law by repudiating *Finley*, and thus resolves the controversy over pendent-party jurisdiction. See H.R. REP. NO. 734, 101st Cong., 2d Sess. 28-29, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 6860, 6874-75; Harbor Ins. Co. v. Continental Bank Corp., 922 F.2d 357, 362 (7th Cir. 1990); Dun & Bradstreet, Inc. v. Walter, No. 90C 5577 (N.D. Ill. May 7, 1991) (LEXIS, Genfed Library, Dist file).

280. H.R. REP. NO. 734, 101st Cong., 2d Sess. 29 n.15, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 6860, 6875 n.15.

281. 28 U.S.C.A. § 1367(a) (West Supp. 1991). It should be noted that subsection (b) places further limitations on supplemental jurisdiction in cases solely founded on diversity jurisdiction. See *infra* Part III.B.

282. See *supra* notes 59-69 and accompanying text.

283. See *supra* notes 101-118 and accompanying text; see also *supra* notes 215-219 and accompanying text (discussing the unsuccessful attempts to compare the standards used to extend pendent and ancillary jurisdiction).

284. Matasar, *Rediscovering "One Constitutional Case," supra* note 17, at 1452-53.

285. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

286. See *supra* notes 59-69, 215-218 and accompanying text.

decision.²⁸⁷ District Court Judge Herbert Goodrich observed in his speech to the Nebraska State Bar Association:

I suppose one great weakness which . . . judges are addicted to is the lack of care in the use of words. . . . It is the habit of judges to express their own legal conclusions in their own way, and the first thing you will find the same legal conclusions being expressed in half a dozen different ways in the same opinion in the same court—the same opinion expressed half a dozen different ways by half a dozen different judges

. . . .
One of our dangers is and was very definitely a carelessness or noncommon use in connection with languages.²⁸⁸

To equate, rather than distinguish, the standards of “common nucleus of operative fact” and “same transaction and occurrence” may be more consistent with the *Gibbs* decision.²⁸⁹ In a subsequent case, Justice Brennan, author of the *Gibbs* decision, stated that “the question of Art. III power in the federal judiciary to exercise subject-matter jurisdiction concerns whether the claims asserted are such as ‘would ordinarily be expected to [be tried] in one judicial proceeding.’”²⁹⁰ Justice Brennan’s statement does not mention the “common nucleus of operative fact” language. Instead, it focuses on the third criterion under *Gibbs* of single trial expectancy. Although this does not establish that Justice Brennan intended to repudiate the standard he announced in *Gibbs*, his emphasis on the third criterion suggests his preference for a pragmatic approach, rather than a mechanistic adherence to a formula. Brennan’s focus emphasizes the purposes underlying extra-jurisdictional power, as opposed to the need for some requisite factual overlap. Emphasizing the common goals underlying supplemental jurisdiction unifies the varying standards previously associated with pendent and ancillary jurisdiction.²⁹¹

287. Matasar, *Rediscovering “One Constitutional Case,”* *supra* note 17, at 1453.

288. Goodrich, *Restatement*, 25 NEB. L. REV. 159, 164 (1945) (as quoted in Forrester, *Truth in Judging: Supreme Court Opinions as Legislative Drafting*, 38 VAND. L. REV. 463, 468 (1985)); see also Forrester, *supra* at 467-69 (arguing that the Supreme Court has caused much confusion by its inconsistent and haphazard use of language).

289. See Matasar, *Rediscovering “One Constitutional Case,”* *supra* note 17, at 1453-54 (arguing that the “transactional” approach more closely adheres to the intent of *Gibbs*); Schenkier, *supra* note 9 (arguing that *Gibbs* establishes a transactional standard for pendent jurisdiction); see also Comment, *Toward A Synthesis of Two Doctrines*, *supra* note 43, at 1280 (contending that “*Gibbs* did away with most of the distinctions between pendent and ancillary jurisdiction”).

290. *Aldinger v. Howard*, 427 U.S. 1, 20 (1976) (Brennan, J., dissenting) (quoting a series of Second Circuit opinions by Judge Friendly).

291. The legislative history of section 1367 further supports equating the ancillary and pendent jurisdictional standards. In its recommendation to codify the doctrines of pendent and ancillary jurisdiction, the Federal Courts Study Committee advised that “Congress expressly

When determining the boundaries of supplemental power, courts should focus on the fundamental goals underlying this power—judicial efficiency, convenience, fairness to litigants, and the creation of an attractive federal forum to vindicate federal rights.²⁹² A standard that focuses on the logical relationship between the federal and nonfederal claims furthers these underlying goals better than a standard that focuses on factual identity between the claims. Such a standard would be consistent with both *Gibbs*, which marked the rejection of factual identity as the standard for determining supplemental power,²⁹³ and section 1367, which focuses on the purposes underlying the congressional grant of supplemental jurisdiction.²⁹⁴ Thus, under a pragmatic approach, which emphasizes the logical relationship between claims, supplemental jurisdiction should be exercised when enough connection exists between the federal and nonfederal claims that litigating them together would be efficient and just.²⁹⁵

To alleviate confusion, the “transaction or occurrence” language in the Federal Rules²⁹⁶ should be interpreted consistently with the “logical relationship” approach.²⁹⁷ Permissive counterclaims, for ex-

authorize federal courts to hear any claim arising out of the same ‘transaction or occurrence’ as a claim within federal jurisdiction.” FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47 (April 2, 1990) (emphasis added). Furthermore, in describing the federal courts’ authority to exercise supplemental jurisdiction prior to *Finley*, the House Report states that “Supplemental jurisdiction has enabled federal courts and litigants to take advantage of the federal procedural rules on claim and party joinder to deal economically . . . with related matters, usually those arising from the same transaction, occurrence, or series of transactions or occurrences.” H.R. REP. NO. 734, 101st Cong., 2d Sess. 28, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 6860, 6874 (emphasis added). Congress thus intended to codify the *Gibbs* standard of supplemental jurisdiction, *id.* at 28, 29 n.15, while referring to the “same transaction or occurrence” language.

292. See H.R. REP. NO. 734, 101st Cong., 2d Sess. 28, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 6860, 6874.

293. *United Mine Workers v. Gibbs*, 383 U.S. 714, 724-25 (1966). See also Schenkier, *supra* note 9, at 266-71.

294. See H.R. REP. NO. 734, 101st Cong., 2d Sess. 29, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 6860, 6874-75.

295. This standard may require only a loose factual connection. See Mengler, *supra* note 8, at 274 (arguing that federal courts have fostered efficiency by requiring only a loose factual connection between the federal and related nonfederal claims); see also *supra* notes 62-63, 107-109 and accompanying text (discussing cases taking this approach).

296. See FED. R. CIV. P. 13, 14, 19, 20, and 24.

297. Some lower federal courts have taken this approach. See *supra* notes 105-109 and accompanying text. Because the Federal Rules cannot extend or limit the scope of federal jurisdiction, FED. R. CIV. P. 82, the definition of “same transaction or occurrence” in the Federal Rules should be equivalent to the definition of a “constitutional case.” Claims make up a “constitutional case” when they are logically related. See *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 617 n.14 (1966); *Great Lakes Rubber Corp. v. Herbert Cooper Co., Inc.*, 286 F.2d 631, 633 (3d Cir. 1961); see also Fraser, *Ancillary Jurisdiction of Federal*

ample, consist of any claims against an opposing party "not arising out of the same transaction or occurrence that is the subject matter of the opposing party's claim."²⁹⁸ Thus, courts should continue to construe this provision as requiring an independent basis for jurisdiction.²⁹⁹ Although some courts have held that the transaction or occurrence language does not define the outer boundaries of supplemental jurisdiction,³⁰⁰ the extension of jurisdiction beyond the logical relationship boundaries would constitute an unconstitutional usurpation of power.³⁰¹

The best approach to determine the boundaries of federal supplemental power is pragmatic rather than definitional.³⁰² Application of a pragmatic approach appropriately focuses on the central goals underlying the grant of supplemental power. It will foster judicial efficiency and party convenience by creating one sensible litigation package. Furthermore, it will make the use of federal courts more attractive, thus promoting the congressional intent underlying the original federal jurisdictional statutes. This interpretation allows federal courts to concentrate on the case before it, rather than engaging in verbal gymnastics to determine whether it should exercise supplemental jurisdiction.

(2) *The Statutory Inquiry*

Section 1367 provides the express congressional authorization that federal courts needed after *Finley* to exercise pendent or ancillary jurisdiction.³⁰³ The previously required statutory inquiry remains, but as

Courts, supra note 172, at 483 (arguing that because the Federal Rules cannot change federal jurisdiction, the same test should be used to determine when a person can intervene as of right under FED. R. CIV. P. 24(a) and when ancillary jurisdiction exists).

298. FED. R. CIV. P. 13(b) (emphasis added).

299. See *supra* note 122.

300. E.g., *Abromovage v. United Mine Workers*, 726 F.2d 972, 990 (3d Cir. 1984).

301. But see Matasar, *Rediscovering "One Constitutional Case," supra* note 17, at 1478-79, in which Professor Matasar argues that:

"Case" or "controversy" as used in article III refers to the limits of joinder of claims and parties set by the system of rules lawfully adopted to govern procedure in the federal courts. Supplemental jurisdiction, therefore, is constitutionally permissible whenever the rules governing federal procedure permit the joinder in one action of jurisdictionally insufficient nonfederal claims or parties with a jurisdictionally sufficient federal claim.

Id. at 1478-79. It appears, therefore, that Professor Matasar would advocate the joinder of permissive counterclaims pursuant to FED. R. CIV. P. 13(b) under supplemental jurisdiction because the Federal Rules so provide.

302. See 6 FEDERAL PRACTICE AND PROCEDURE: CIVIL, *supra* note 59, § 1410.

303. See *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 362 (7th Cir. 1990)

an altered and less limiting principle. Under *Aldinger v. Howard*³⁰⁴ and *Owen Equipment & Erection Co. v. Kroger*,³⁰⁵ a federal court had to determine whether Congress had *explicitly or implicitly negated* supplemental jurisdiction.³⁰⁶ After *Finley v. United States*,³⁰⁷ a federal court had to determine whether Congress had *explicitly authorized* supplemental jurisdiction.³⁰⁸ Now, a federal court need only determine whether the statute conferring federal jurisdiction *explicitly rejects* supplemental jurisdiction.³⁰⁹

B. Additional Limitations in Federal Diversity Cases Pursuant to Section 1367(b)

Section 1367(a) applies equally to cases based on the federal courts' diversity jurisdiction.³¹⁰ In diversity cases, however, subsection (b) places special limitations on supplemental jurisdiction. By focusing on the basis of the federal court's jurisdiction as the primary determinant of the courts' power to exercise supplemental jurisdiction, Congress has acknowledged the Supreme Court's trend of distinguishing between supplemental power in diversity and federal question cases.³¹¹ Thus, the initial inquiry is whether the federal court's original jurisdiction is based on federal question or diversity, and not whether the exercise of supplemental jurisdiction is pendent or ancillary.

In diversity actions, subsection (b) prohibits federal courts from exercising supplemental jurisdiction over plaintiffs' claims against parties joined by any of the Federal Rules' joinder provisions when supplemental jurisdiction over such claims would be inconsistent with the

(noting that section 1367 overrules *Finley* and provides a statutory basis for supplemental jurisdiction); *Dun & Bradstreet, Inc. v. Walter*, No. 90 C 5566 (N.D. Ill. May 7, 1991) (LEXIS, Genfed library, Dist file) (noting that "Congress has . . . mooted the *Finley* decision by enacting legislation that authorizes pendent-party jurisdiction).

304. 427 U.S. 1 (1976).

305. 437 U.S. 365 (1978).

306. See *Aldinger*, 427 U.S. at 18; *Kroger*, 437 U.S. at 372-76.

307. 490 U.S. 545 (1989).

308. *Id.* at 549-51.

309. See 28 U.S.C.A. § 1367(a) (West Supp. 1991). Under section 1367, the federal courts are empowered to exercise supplemental jurisdiction unless another federal statute "expressly provides otherwise." *Id.* (emphasis added). At least one district court specifically has held that section 1367 eliminates the statutory barrier which was determinative in the *Aldinger* decision. *Rosen v. Chang*, 758 F. Supp. 799, 803-04 (D.R.I. 1991). Observing that *Aldinger* does not apply after section 1367, the court asserted supplemental jurisdiction over an additional party in a factual context virtually identical to that in *Aldinger*. *Id.*

310. See 28 U.S.C.A. § 1367 (West Supp. 1991).

311. See *supra* notes 201-204 and accompanying text.

jurisdictional requirements of the diversity statute.³¹² This includes impleader, compulsory party joinder, permissive joinder, and intervention. Similarly, subsection (b) prohibits the exercise of supplemental jurisdiction in connection with the joinder or intervention of third parties as plaintiffs when inconsistent with section 1332.³¹³

(1) *A Proper Interpretation of Section 1367(b)'s Limitations*

At least three interpretations of subsection (b) are possible. First, subsection (b) might be read expansively to prohibit the exercise of supplemental jurisdiction *anytime* a plaintiff raises a claim against a nondiverse defendant in a diversity case. This reading may be supported by the rationale that allowing a claim between nondiverse parties in a diversity action facially violates section 1332's complete diversity requirement.

The legislative history of section 1367, however, counters this expansive reading. In the discussion of subsection (b), the House Report states:

In diversity-only actions the district courts may not hear plaintiffs' supplemental claims when exercising supplemental jurisdiction *would encourage plaintiffs to evade the jurisdictional requirements of 28 U.S.C. § 1332* by the simple expedient of naming initially only those defendants whose joinder satisfies section 1332's requirements and later adding claims not within original federal jurisdiction against other defendants who have intervened or been joined on a supplemental basis.³¹⁴

Thus, courts should focus on whether extension of supplemental jurisdiction under the circumstances would encourage plaintiffs to circumvent the diversity jurisdiction requirements. This does not necessarily include every situation in which the exercise of supplemental jurisdiction facially would violate the diversity statute.³¹⁵

The explicit language of section 1367(b) also supports a less expansive reading. The last clause of subsection (b) focuses on whether the exercise of supplemental jurisdiction would be *inconsistent* with the diversity jurisdiction requirements.³¹⁶ If Congress intended to prohibit all claims brought by plaintiffs against nondiverse defendants in diversity actions, it could have provided for this explicitly. For example, the last clause could have provided that district courts shall not exercise supplemental jurisdiction when extending jurisdiction

312. 28 U.S.C.A. § 1367(b) (West Supp. 1991).

313. *Id.*

314. H.R. REP. NO. 734, 101st Cong., 2d Sess. 29, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6860, 6875 (emphasis added).

315. *See infra* notes 321-327 and accompanying text.

316. 28 U.S.C.A. § 1367(b) (West Supp. 1991).

would *violate* section 1332's requirements. Instead, by providing that federal courts should determine whether the simultaneous exercises of supplemental and diversity jurisdictions are *inconsistent*, Congress directs federal courts not to focus upon section 1332's literal requirements, but to examine whether the exercise of supplemental jurisdiction would encourage plaintiffs' evasion of those requirements.

A second possible interpretation of subsection (b) is a narrow approach. Such a reading might lead to a conclusion that subsection (b) applies only to cases in which a *plaintiff* attempts to join the non-diverse defendant or a party attempts to intervene as a plaintiff. Thus, if a *defendant* initiates joinder of a nondiverse third party—as in the case of impleader of a third-party defendant—then the plaintiff subsequently may bring a claim against that party.

Although commentators have argued that supplemental jurisdiction in this context does not encourage plaintiffs to circumvent the complete diversity requirement,³¹⁷ Congress' intent excludes such a narrow interpretation of section 1367. According to the House Report, "[t]he net effect of subsection (b) is to implement the principal rationale of *Owen Equipment & Erection Co. v. Kroger*."³¹⁸ The *Kroger* decision prohibited the exercise of supplemental jurisdiction over a plaintiff's claim against a nondiverse third party defendant. Even though the defendant had initiated the joinder of the third party, the plaintiff could not bring a claim against the third party defendant in federal court.³¹⁹ Because the most narrow interpretation of section 1367(b) is inconsistent with the Supreme Court's *Kroger* decision, it is also inconsistent with Congress' intent underlying the enactment of the statute.

The most reasonable interpretation of section 1367(b) falls between the expansive and narrow approaches. The optimal solution focuses on Congress' intent but limits the application of the statute's restrictions to only those contexts in which Congress' concerns may arise. Congress' primary concern underlying subsection (b) was that exercising supplemental jurisdiction over additional nondiverse parties in diversity cases "would encourage plaintiffs to evade the jurisdictional requirements of 28 U.S.C. § 1332."³²⁰ This concern, however,

317. See *supra* notes 138-140 and accompanying text.

318. H.R. REP. NO. 734, 101st Cong., 2d Sess. 29 n.16, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6860, 6875 n.16. It should be noted that even though the *Kroger* decision has been criticized severely, one of its positive aspects was eliminating some of the federal courts' workload by reducing the federal diversity docket and shifting pure state law claims to the state courts. Mengler, *supra* note 8, at 286. The significance of this result has grown since the *Kroger* decision. See *supra* note 6, and accompanying text.

319. See *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 372-77 (1978).

320. H.R. REP. NO. 732, 101st Cong., 2d Sess. 29, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6860, 6875.

does not arise every time a plaintiff raises a claim against a nondiverse defendant in a diversity case.

Once the plaintiff is placed in a *defensive* position,³²¹ because a party in a defensive posture asserts a claim against her, extending supplemental jurisdiction over her logically related claim against a non-diverse party would not encourage the circumvention of the complete diversity requirement. Two possibilities under Federal Rule 14 are relevant in this context: First, if a third-party defendant asserts a claim against the plaintiff that is logically related to the plaintiff's original claim,³²² Federal Rule 14(a) provides that the *plaintiff* may assert a compulsory counterclaim to the third-party defendant's claim.³²³ Second, if a defendant raises a compulsory counterclaim against the plaintiff, Federal Rule 14(b) provides that the *plaintiff* may implead a third party who is or may be liable to her for all or part of the defendant's claim against her.³²⁴

The *Kroger* rationale might be read to prohibit the exercise of jurisdiction in either of these contexts. As in *Kroger*, the plaintiff in both scenarios is asserting a nonfederal claim against a nondiverse third party. Under the *Kroger* rationale, "[c]hoice of forum determines posture. The party who chooses the forum is in an offensive posture."³²⁵

A better approach, however, is to distinguish *Kroger* because the plaintiff in these contexts is in a *defensive position*. Given that the plaintiff is asserting her claim defensively, there can be no fear that she is attempting to circumvent the complete diversity requirement.³²⁶ Moreover, when the plaintiff is subject to an adversarial claim, considerations of fairness favor the extension of supplemental jurisdiction.³²⁷

321. As used herein, "position" is distinguished from "posture." "Posture" is determined by the choice of forum: the party who chooses the forum is in an offensive *posture*. See *supra* notes 142-143 and accompanying text. In contrast, "position" is determined by the assertion of a claim: the party against whom the relevant claim is asserted is in a defensive *position*. See, e.g., *Brown & Caldwell v. Inst. for Energy Funding, Ltd.*, 617 F. Supp. 649, 651 (C.D. Cal. 1985). The plaintiff in the preceding case would be described as being in an offensive *posture* but a defensive *position*: the plaintiff chose the federal forum placing her in the offensive posture, but when the defendant brought a counterclaim against the plaintiff, the plaintiff was put in a defensive position.

322. See *supra* note 147 and accompanying text.

323. FED. R. CIV. P. 14(a).

324. FED. R. CIV. P. 14(b).

325. Note, *Toward a Theory of Incidental Jurisdiction*, *supra* note 21, at 1944. See *supra* text accompanying notes 142-143.

326. See, e.g., *Basic Mach. Co. v. Ketom Constr., Inc.*, 686 F. Supp. 542, 543-44 (M.D.N.C. 1988); *Brown & Caldwell v. Institute for Energy Funding, Ltd.*, 617 F. Supp. 649, 651 (C.D. Cal. 1985); *supra* notes 151-153 and accompanying text.

327. This rationale also supports the exercise of supplemental jurisdiction when a plaintiff

Thus, a proper interpretation of section 1367(b) limits its application to situations in which a party, seeking either to raise a claim against a nondiverse third party or to intervene, is in an offensive posture and an offensive position. In other words, the term "plaintiff" in subsection (b) should not include plaintiffs placed in a defensive position.

(2) *Elimination of an Anomaly*

Although courts and commentators have argued that supplemental jurisdiction is proper over intervenors of right,³²⁸ section 1367(b) explicitly prohibits the exercise of supplemental jurisdiction over claims by persons "seeking to intervene *as plaintiffs* under Rule 24."³²⁹ Arguably, supplemental jurisdiction in this context is consistent with the *Kroger* opinion and, thus, consistent with Congress' desire to "implement the principal rationale" of *Kroger*.³³⁰ Allowing supplemental jurisdiction over persons who intervene as plaintiffs, however, may encourage circumvention of the diversity jurisdiction requirements. For example, two plaintiffs, X and Y, each have state claims against one defendant, but only X is diverse as to the defendant. Although both X and Y wish to bring their actions in federal court, only X can bring its action in federal court. X does so, and when the action is commenced, Y files an application to intervene as of right. Y meets the requirements of Federal Rule 24(a).³³¹ To allow supplemental jurisdiction in this context, however, permits Y to evade the jurisdictional requirement of complete diversity.³³² Congress found this scenario to be a viable risk when it enacted section 1367(b), because it clearly prohibits the exercise of supplemental jurisdiction over claims by intervening plaintiffs.³³³

The possibility does remain, however, that a nondiverse defendant may intervene. By exclusion, section 1367(b) permits the exercise of supplemental jurisdiction over claims by persons seeking to intervene

joins a nondiverse third-party as part of its defense to a counterclaim or cross-claim under FED. R. CIV. P. 13(h).

328. See *supra* notes 172-176, 186-190 and accompanying text.

329. 28 U.S.C.A. § 1367(b) (West Supp. 1991) (emphasis added).

330. H.R. REP. NO. 734, 101st Cong., 2d Sess. 29 n.16, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6860, 6875 n.16.

331. See *supra* text accompanying note 169.

332. But see 7C FEDERAL PRACTICE AND PROCEDURE: CIVIL, *supra* note 59, § 1917, at 477 (arguing that ancillary jurisdiction in this context does not encourage circumvention of the complete diversity requirement).

333. 28 U.S.C.A. § 1367(b) (West Supp. 1991).

as *defendants* under Federal Rule 24.³³⁴ This is consistent with the recommended interpretation of section 1367(b).³³⁵ Because an intervening defendant does not choose the forum or assert the relevant claim, she is in both a defensive posture and a defensive position. Thus, there is no concern that such a party is attempting to circumvent the complete diversity requirement.

Similarly, section 1367(b) significantly modifies prior law regarding the joinder of parties under Federal Rule 19. Subsection (b) provides that in diversity actions "district courts shall not have supplemental jurisdiction . . . over claims by persons proposed to be joined as *plaintiffs* under Rule 19"³³⁶ Thus, although section 1367 prohibits the joinder of a plaintiff if it would defeat the court's diversity jurisdiction, by exclusion it permits a necessary *defendant* to be joined pursuant to Federal Rule 19 on a supplemental basis.³³⁷ Federal Rule 19 provides that joinder of a necessary nonparty is feasible only if such joinder will not deprive the court of subject matter jurisdiction.³³⁸ In the case of a necessary nondiverse *defendant*, section 1367(b) now provides the courts with supplemental jurisdiction to make joinder of that defendant feasible in a diversity action. Prior to the enactment of section 1367, a nondiverse third party could not be joined under Federal Rule 19 in a diversity action, either as a plaintiff or defendant, because it would destroy the diversity jurisdiction of the federal court.³³⁹

By prohibiting supplemental jurisdiction when the plaintiff seeks to join or intervene, but authorizing supplemental jurisdiction when the defendant seeks to join or intervene, Congress has alleviated the previously existing anomaly.³⁴⁰ The exercise of supplemental jurisdiction in the contexts of intervention and compulsory joinder now depends on whether the person seeking to intervene or sought to be joined is a plaintiff or a defendant; it is irrelevant whether the absentee is classified as merely a "necessary" or an "indispensable" party.³⁴¹ It

334. It should be noted that section 1367(b) does not distinguish between intervention of right under FED. R. CIV. P. 24(a) and permissive intervention under FED. R. CIV. P. 24(b). Thus, it appears that, where a person seeks to intervene *permissively* as a defendant in a diversity case and her claim is logically related to the main claim, the federal court is empowered to exercise supplemental jurisdiction. This constitutes a change in the law prior to *Finley*. See *supra* note 172.

335. See *supra* notes 320-327 and accompanying text.

336. 28 U.S.C.A. § 1367(b) (West Supp. 1991) (emphasis added).

337. Section 1367(b), however, prohibits the plaintiff from initiating a claim against the newly joined defendant unless the plaintiff is placed in a defensive position. See *supra* notes 319-327 and accompanying text.

338. FED. R. CIV. P. 19(a).

339. See *supra* notes 162-165 and accompanying text.

340. See *supra* notes 177-183 and accompanying text.

341. It must be noted, however, that these classifications still are relevant to the court's

is also irrelevant whether the absentee seeks to intervene or is brought into the action by the original parties.³⁴² By so providing, Congress has created consistent rules for fair, efficient, and predictable joinder. The propriety of supplemental jurisdiction over additional parties now is founded on the genuine concern of encouraging the evasion of jurisdictional requirements. It no longer is determined by random judicial categorization of those parties seeking to join or intervene.

Conclusion

The effectiveness of the federal judicial system as it relates to extra-jurisdictional power was seriously threatened by the *Finley* decision. Congress alleviated this threat and made substantial systemic improvements with its statutory resurrection of supplemental jurisdiction.³⁴³ Through the enactment of section 1367 of the United States Code, Title 28, Congress also alleviated much of the inconsistency plaguing the doctrines of pendent and ancillary jurisdiction. By so providing, Congress expanded the courts' pre-*Finley* pendent and ancillary powers in some directions³⁴⁴ while restricting them in others.

Section 1367 supplies the federal district courts with a uniform analytical framework for the determination of supplemental jurisdictional power. First, in *any* case falling within original federal jurisdiction, the district court must determine whether the supplemental claims are so related to the federal claims that they form part of the same constitutional case as defined by Article III.³⁴⁵ This Note suggests that the Constitution, and thus the statute, require no more than a logical relationship between the federal and supplemental claims. Emphasis should not be placed on the degree of factual overlap between the principal and supplemental claims; in some cases no more than

determination of whether it may proceed in the person's absence when supplemental power does not exist. For example, when the federal court cannot exercise supplemental jurisdiction over the absentee, and that absentee is an "indispensable" party under Federal Rule 19(b), the court should deny intervention or joinder and consider dismissing the entire action. H.R. REP. NO. 734, 101st Cong., 2d Sess. 29, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6860, 6875. *See supra* notes 131-133 and accompanying text.

342. This constitutes a significant change in prior law. *See* H.R. REP. NO. 734, 101st Cong., 2d Sess. 29, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 6860, 6875.

343. 28 U.S.C.A. § 1367 (West Supp. 1991).

344. Some lower federal courts have already recognized that § 1367 expands federal supplemental power. *See, e.g.,* FDIC v. Loube, 134 F.R.D. 270, 274 n.3 (N.D. Cal. 1991) (noting that § 1367 "expands the jurisdiction of the U.S. District Courts into a new concept of 'supplemental jurisdiction,' broader than the former concept of ancillary or pendent jurisdiction") (emphasis added).

345. 28 U.S.C.A. § 1367(a) (West Supp. 1991).

a loose factual connection will be necessary. Instead, federal courts should use a pragmatic approach, focusing on judicial efficiency, convenience, fairness to the litigants, and the congressional purpose of creating a meaningful choice between state and federal forums for the vindication of federal rights.

This extension of supplemental power to the outer limits of the Constitution applies to claims between existing parties and claims involving the joinder or intervention of additional parties.³⁴⁶ Congress, thus, has alleviated the doctrinal problems previously accompanying pendent-party jurisdiction.³⁴⁷

The second step under the new analysis consists of a revised statutory inquiry. Before exercising supplemental jurisdiction, a federal court must determine whether Congress, in the relevant jurisdictional statute, has *explicitly rejected* supplemental jurisdiction in the particular context.³⁴⁸

Finally, Congress has placed special limitations on supplemental jurisdiction over claims involving the joinder or intervention of additional nondiverse parties in cases based solely on diversity of citizenship.³⁴⁹ These additional restrictions, however, should be applied only in those diversity cases where the congressional concerns underlying section 1367(b) exist: cases in which extending jurisdiction "would encourage plaintiffs to evade the jurisdictional requirements" of the diversity statute.³⁵⁰ Properly interpreted, section 1367(b) only prevents federal courts from hearing supplemental claims either asserted by a plaintiff *in an offensive position* against a nondiverse party, or raised by a nondiverse absentee proposed to be joined or seeking to intervene as a plaintiff. Congress has rejected the previous anomalous distinctions between party joinder and intervention, and between necessary and indispensable parties. Congress has substituted a uniform jurisdictional approach which balances the benefits of applying supplemental jurisdiction liberally with the jurisdictional requirements of diversity jurisdiction. As a result, in diversity cases, some supplemental claims that previously were excluded now come within the federal courts' supplemental jurisdiction; other claims that previously were within the courts' ancillary powers are now excluded, *but only* where

346. *Id.*

347. See *Aldinger v. Howard*, 427 U.S. 1 (1976); *Finley v. United States*, 490 U.S. 545 (1989).

348. See 28 U.S.C.A. § 1367(a) (West Supp. 1991).

349. *Id.* § 1367(b).

350. H.R. REP. NO. 734, 101st Cong., 2d Sess. 29, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 6860, 6875.

it appears that the original plaintiff or co-plaintiff intervenor have manipulated jurisdiction.

As interpreted herein, section 1367 provides federal courts with consistent rules of claim and party joinder. The Author hopes that federal courts will effectuate the statute's overall policy of encouraging the fair and efficient use of the federal judicial system. This only will be accomplished though the responsible application of the new rules of supplemental jurisdiction.